

TAB 98

Macey, Jonathan R.

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New York, NY

May 19, 2009

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UNITED STATES OF AMERICA, ex rel,
VEN-A-CARE, FLORIDA KEYS, INC.,

Plaintiffs,

Case No. 07-10248

-against-

BOEHRINGER INGELHEIM CORPORATION,
et al.,

Defendants.

-----x

May 19, 2009

9:00 a.m.

CONFIDENTIAL

Deposition of JONATHAN R. MACEY, taken at
the offices of Kirkland & Ellis, Citigroup Center,
153 East 53rd Street, New York, New York, before
Georgette K. Betts, a Certified Shorthand
Reporter, Registered Professional Reporter and
Notary Public within and for the States of New
York and New Jersey.

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May 19, 2009

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<p style="text-align: right;">14</p> <p>1 Court opinion that I referred to as Best Foods. I</p> <p>2 think it's the U.S. against Best Foods, which</p> <p>3 articulates the standards that should be applied</p> <p>4 in cases in which there are -- there's charges of</p> <p>5 strict liability under CERCLA in the context of an</p> <p>6 affiliate corporation or a parent/subsidiary</p> <p>7 corporation.</p> <p>8 Q. Are the Best Foods standards relevant to</p> <p>9 corporate control issues, or piercing the</p> <p>10 corporate veil issues, or both?</p> <p>11 A. Both.</p> <p>12 Q. I think the last case we cited is the</p> <p>13 South Carolina Electric and Gas Company versus</p> <p>14 UGI, can you briefly tell me what that case was</p> <p>15 about?</p> <p>16 A. That also is the same exact kind of</p> <p>17 constellation of operative facts as the previous</p> <p>18 case, meaning that it was a reverse piercing case</p> <p>19 brought by a former subsidiary of a utility</p> <p>20 holding company that had been forced to divest the</p> <p>21 subsidiary pursuant to the Public Utility Holding</p> <p>22 Company Act and the subsidiary was now bringing a</p>	<p style="text-align: right;">16</p> <p>1 A. So, in the broadest terms, the</p> <p>2 government is bringing a lawsuit charging that a</p> <p>3 pharmaceutical company overcharged and contributed</p> <p>4 to the overcharging of reimbursement for certain</p> <p>5 of its clients in connection with Medicare and</p> <p>6 Medicaid reimbursement claims.</p> <p>7 Q. How did you acquire this understanding</p> <p>8 of the case?</p> <p>9 A. I think that understanding was acquired</p> <p>10 from reading the complaint.</p> <p>11 Q. Have you talked about the United States'</p> <p>12 allegations with Roxane or the Boehringer</p> <p>13 defendants' counsel?</p> <p>14 A. I believe so, yes.</p> <p>15 Q. The defendants in this -- can you list</p> <p>16 the defendants in this case?</p> <p>17 A. Certainly. I can list -- so, defendants</p> <p>18 in this case are Roxane Laboratories, a holding</p> <p>19 company called B-I-C or Boehringer Ingelheim</p> <p>20 Corporation and a -- which is a -- which owns</p> <p>21 Roxane. And another corporation which I refer to</p> <p>22 as BIPI, Boehringer Ingelheim Pharmaceuticals,</p>
<p style="text-align: right;">15</p> <p>1 lawsuit against its former parent for contribution</p> <p>2 in an environmental cleanup action.</p> <p>3 Q. Thank you.</p> <p>4 Do you understand that you're offering</p> <p>5 an opinion in a federal False Claims Act case</p> <p>6 today?</p> <p>7 A. Yes.</p> <p>8 Q. What's your understanding of the case</p> <p>9 that has been brought by the United States against</p> <p>10 Roxane and the Boehringer defendants?</p> <p>11 A. I'm sorry, I don't understand what you</p> <p>12 mean.</p> <p>13 Q. Do you have an understanding of the</p> <p>14 allegations that the United States has made</p> <p>15 against Roxane Laboratories and the Boehringer</p> <p>16 defendants?</p> <p>17 A. I think so.</p> <p>18 Q. Can you tell me what that understanding</p> <p>19 is?</p> <p>20 A. You mean sort of just generally</p> <p>21 speaking?</p> <p>22 Q. In broadest terms.</p>	<p style="text-align: right;">17</p> <p>1 Incorporated, which is another subsidiary of BIC.</p> <p>2 Q. I guess from your answer that you're</p> <p>3 okay with this, but is it okay if we refer to</p> <p>4 Boehringer Ingelheim Pharmaceuticals Incorporated</p> <p>5 as BIPI, and Boehringer Ingelheim Corp. as BIC?</p> <p>6 A. Yes, that would be fine with me.</p> <p>7 Q. Is it your understanding that both</p> <p>8 Roxane and BIPI are wholly-owned subsidiaries of</p> <p>9 BIC?</p> <p>10 A. Yes, that is my understanding.</p> <p>11 Q. Are you aware that the United States has</p> <p>12 alleged that BIPI and BIC were actively involved</p> <p>13 in the underlying alleged fraudulent conduct</p> <p>14 including decisions to set inflated AWP's?</p> <p>15 A. Yes.</p> <p>16 Q. Are you offering any opinion as to</p> <p>17 whether or not BIC and/or BIPI are liable under</p> <p>18 the False Claims Act for any role they played in</p> <p>19 pricing, marketing, or selling Roxane's products?</p> <p>20 A. Could you repeat that, I'm sorry I</p> <p>21 missed the first part of the question.</p> <p>22 (Record read.)</p>

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6 (Pages 18 to 21)

<p style="text-align: right;">18</p> <p>1 A. I'm not offering any opinions about the</p> <p>2 ultimate conclusions of law or fact in this case.</p> <p>3 I am offering conclusions about the corporate</p> <p>4 governance control and control relationships among</p> <p>5 the three companies Roxane, BIC, and BIPI that</p> <p>6 we've -- that I previously identified as</p> <p>7 defendants.</p> <p>8 Q. Are you offering an opinion as to</p> <p>9 whether or not BIC or BIPI's conduct itself</p> <p>10 violates the False Claims Act?</p> <p>11 MS. RIVERA: Object to form.</p> <p>12 A. Again I would give -- I'm not offering</p> <p>13 any, you know, ultimate conclusions about how the</p> <p>14 resolution of the case or even about what the law</p> <p>15 is. I'm offering opinions about the relationships</p> <p>16 among these corporations and it would really be up</p> <p>17 to the judge, I think, to draw whatever</p> <p>18 conclusions about ultimate liability.</p> <p>19 Q. Do you know what the standard for</p> <p>20 liability is under the False Claims Act?</p> <p>21 A. In general terms I believe I do, yes.</p> <p>22 Q. What is it?</p>	<p style="text-align: right;">20</p> <p>1 ordinary, typical business practices are and how</p> <p>2 those ordinary and customary business practices</p> <p>3 relate to or are consistent or inconsistent with</p> <p>4 the practices that we observe in this case.</p> <p>5 Q. When were you first contacted by a</p> <p>6 lawyer regarding any cases brought against Roxane</p> <p>7 or a Boehringer entity relating to allegations of</p> <p>8 inflated AWP's?</p> <p>9 A. Sometime in early 2009.</p> <p>10 Q. Who was that lawyer?</p> <p>11 A. I'm not certain but I believe that it</p> <p>12 was an attorney at the Kirkland & Ellis firm named</p> <p>13 Meghan Dolan.</p> <p>14 Q. And that was early 2009?</p> <p>15 A. Yes.</p> <p>16 Q. What other Roxane or Boehringer</p> <p>17 attorneys have you spoken with about the case?</p> <p>18 A. I've also spoken with Maria Rivera, and</p> <p>19 I have spoken with an attorney name Anne Sidrys, I</p> <p>20 believe is the name.</p> <p>21 Q. Can you think of any others?</p> <p>22 A. No, I cannot.</p>
<p style="text-align: right;">19</p> <p>1 A. Under the False Claims Act it's illegal</p> <p>2 to -- and I can't remember the exact language of</p> <p>3 the statute, but it's something to the effect of</p> <p>4 submitting a false claim or causing a false claim</p> <p>5 to be submitted to the government.</p> <p>6 Q. Are you offering any opinion as to</p> <p>7 whether or not BIC and/or BIPI knowingly or</p> <p>8 recklessly participated in the submission of false</p> <p>9 claims to the government?</p> <p>10 A. Again, I'm offering opinions not about</p> <p>11 any kind of ultimate legal issue but about the</p> <p>12 control relationships among these firms and their</p> <p>13 corporate governance relationships.</p> <p>14 Q. What do you mean by the control</p> <p>15 relationships and corporate governance</p> <p>16 relationships?</p> <p>17 A. So I'm offering opinions about -- as a</p> <p>18 general matter of corporate governance, that is,</p> <p>19 with respect to common practice among</p> <p>20 corporations, what the relationship is between</p> <p>21 parent companies and wholly-owned subsidiaries</p> <p>22 such as BIC and Roxane and BIPI and what sort of</p>	<p style="text-align: right;">21</p> <p>1 Q. How many times, in your best guess,</p> <p>2 would you say you've spoken with a Roxane or</p> <p>3 Boehringer attorney since your first conversation</p> <p>4 in early 2009?</p> <p>5 A. Ten is approximately, that is not by any</p> <p>6 stretch an attempt to be -- to get the exact</p> <p>7 number.</p> <p>8 Q. Have your communications with defense</p> <p>9 counsel been by phone or e-mail or both?</p> <p>10 A. Phone.</p> <p>11 Q. Have you been retained by Roxane or</p> <p>12 Boehringer Ingelheim to provide opinions in any</p> <p>13 cases other than the United States' lawsuit?</p> <p>14 A. No.</p> <p>15 MR. FAUCI: Let me introduce your</p> <p>16 engagement letter as Exhibit 2.</p> <p>17 (Whereupon, Engagement letter, was</p> <p>18 marked as Exhibit Macey 002 for identification, as</p> <p>19 of this date.)</p> <p>20 Q. I neglected to mention this earlier, I</p> <p>21 try and take breaks every hour or so, but if at</p> <p>22 any point you need a break just let me know and</p>

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<p style="text-align: right;">22</p> <p>1 we'll do our best to accommodate that.</p> <p>2 A. Thank you very much, I appreciate that.</p> <p>3 Q. Is this a copy of the letter you signed</p> <p>4 with Kirkland & Ellis starting your engagement in</p> <p>5 this matter?</p> <p>6 A. Yes, it is.</p> <p>7 Q. If you turn to the last page, do you see</p> <p>8 that it's signed on behalf of the Boehringer</p> <p>9 Ingelheim Corporation, BIPI, and Roxane</p> <p>10 Laboratories by Sheila Denton?</p> <p>11 A. Yes, I do.</p> <p>12 Q. Have you spoken with Ms. Denton?</p> <p>13 A. No, I have not.</p> <p>14 Q. If you turn back to the first page, is</p> <p>15 \$750 per hour your customary fee?</p> <p>16 A. Yes, it is, it's my customary hourly</p> <p>17 rate for my time.</p> <p>18 Q. You can put that aside.</p> <p>19 I'm going to introduce your list of</p> <p>20 materials considered as Exhibit 3.</p> <p>21 (Whereupon, list of materials</p> <p>22 considered, was marked as Exhibit Macey 003 for</p>	<p style="text-align: right;">24</p> <p>1 it hadn't made the list since it was a little bit</p> <p>2 different than some of the other ones. It hadn't</p> <p>3 been marked as a previous exhibit or anything like</p> <p>4 that, so it just popped into my head.</p> <p>5 Q. Did you actually read all the materials</p> <p>6 listed in Exhibit 3?</p> <p>7 A. I looked at all these materials. Some I</p> <p>8 read several times, some I skimmed, but I</p> <p>9 consulted all of these materials, yes.</p> <p>10 Q. I understand this list is voluminous,</p> <p>11 but to the best of your knowledge, have you looked</p> <p>12 at any materials, any new materials since the</p> <p>13 submission of your expert report that would not be</p> <p>14 reflected on this list?</p> <p>15 A. The only thing I can think of is, if you</p> <p>16 notice, if you look at items 501 and 502 and they</p> <p>17 mention the Matthew Perri rough transcript, I</p> <p>18 believe that I have -- in addition to looking at</p> <p>19 the rough transcript, I think between the date of</p> <p>20 the preparation of this document and today I've</p> <p>21 seen the final version of that deposition</p> <p>22 transcript.</p>
<p style="text-align: right;">23</p> <p>1 identification, as of this date.)</p> <p>2 Q. Take a moment to familiarize yourself</p> <p>3 with it. Tell me if you can identify this as a</p> <p>4 complete and up-to-date list of the materials you</p> <p>5 reviewed or considered in forming your opinions in</p> <p>6 this case?</p> <p>7 A. I believe that it is. I was just</p> <p>8 looking through, there might be -- I don't think</p> <p>9 so, but there might be something that's cited in</p> <p>10 my report that's not listed here, although I</p> <p>11 believe that everything cited in my report is</p> <p>12 listed in here.</p> <p>13 Q. Is there a particular document cited in</p> <p>14 your report that you have in mind or just in</p> <p>15 general there may be something that's not here?</p> <p>16 A. Well the reason I looked through it I</p> <p>17 was particularly concerned about item 505 but I</p> <p>18 see that it's listed here, so I believe that that</p> <p>19 means that everything is in here.</p> <p>20 Q. Why were you concerned about item 505?</p> <p>21 A. Oh, just because it was one that I had</p> <p>22 located on the Internet and I was concerned that</p>	<p style="text-align: right;">25</p> <p>1 Q. Other than that you can't think of any</p> <p>2 documents that you looked at for the first time</p> <p>3 after your submission of your expert report?</p> <p>4 A. That's correct. Yes.</p> <p>5 Q. Who decided that the materials listed in</p> <p>6 Exhibit 3 were the materials you were going to</p> <p>7 review?</p> <p>8 A. These materials -- very early in the</p> <p>9 engagement I -- once I understood, once I read the</p> <p>10 complaint by the government, I felt as though I</p> <p>11 was able to, in general terms, identify the kinds</p> <p>12 of documents that would be useful to me in the</p> <p>13 preparation of my opinion. And so I, in broad</p> <p>14 terms, I asked for the documents that fit that</p> <p>15 description and those were identified and sent to</p> <p>16 me.</p> <p>17 Q. What kind of documents?</p> <p>18 A. So, I asked for documents that related</p> <p>19 to corporate governance, internal corporate</p> <p>20 governance, corporate control, the corporate</p> <p>21 relationships between the firms, information about</p> <p>22 the directors of various companies. Information</p>

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<p style="text-align: right;">26</p> <p>1 about board action.</p> <p>2 Obviously 30(b)(6) witness testimony,</p> <p>3 deposition testimony of people that were in</p> <p>4 positions to make decisions or engage in oversight</p> <p>5 of the various companies. So in just in general</p> <p>6 terms things that related -- documents and</p> <p>7 information of any kind that related to corporate</p> <p>8 governance and corporate control.</p> <p>9 Q. What kinds of documents relate to</p> <p>10 corporate governance and corporate control more</p> <p>11 specifically?</p> <p>12 A. Well, so items such as corporate</p> <p>13 charters, bylaws, evidence of board action such as</p> <p>14 consents or minutes. Items related to the way the</p> <p>15 company conducted business and did business and</p> <p>16 the way in which these various organizations</p> <p>17 related to one another.</p> <p>18 Q. Did you ask to look at org charts?</p> <p>19 A. I did ask to look for organizational</p> <p>20 charts although I will tell you in my experience</p> <p>21 with corporations, both as a director and as</p> <p>22 somebody who teaches corporate governance,</p>	<p style="text-align: right;">28</p> <p>1 that's based on your experience as a board of</p> <p>2 director for various corporations?</p> <p>3 A. And as -- both as a member of corporate</p> <p>4 boards and someone who studies corporate</p> <p>5 governance and teaches it.</p> <p>6 Q. Is there any literature on this that</p> <p>7 you're aware of?</p> <p>8 A. I've seen passing references over time,</p> <p>9 I could not cite you to an article specifically</p> <p>10 related to organizational charts inaccuracies.</p> <p>11 Q. This list consists of I believe 612</p> <p>12 entries, am I correct that most of these refer to</p> <p>13 individual documents?</p> <p>14 A. Yes.</p> <p>15 Q. Did you ask to review any marketing</p> <p>16 plans, launch plans?</p> <p>17 A. I recall reviewing documents that</p> <p>18 related to product launches. I did not -- in my</p> <p>19 general document request it was as I conveyed it</p> <p>20 to you and did not specifically -- I didn't use</p> <p>21 the words "product launch" when I was making my</p> <p>22 document request, although some -- in the course</p>
<p style="text-align: right;">27</p> <p>1 organizational charts are often more useful in</p> <p>2 terms of getting a sense of head counts within a</p> <p>3 company than they are for actually determining</p> <p>4 lines of organization and control.</p> <p>5 Q. Why is that?</p> <p>6 A. Generally speaking, it's because the</p> <p>7 people who prepare organizational charts are often</p> <p>8 either in the human resources department of a</p> <p>9 company or may be in some unrelated business to</p> <p>10 the actual operational business and they know how</p> <p>11 many people are working in each area but they</p> <p>12 don't really know on the ground on a day-to-day</p> <p>13 basis who was reporting to whom or who was doing</p> <p>14 what. So there often will be cases in which there</p> <p>15 will be people who, you know, may be listed as</p> <p>16 reporting to others who in fact don't and vice</p> <p>17 versa.</p> <p>18 Q. Do you know who prepared Roxane or</p> <p>19 Boehringer Ingelheim's organizational charts?</p> <p>20 A. No, I don't.</p> <p>21 Q. And your opinion that these charts don't</p> <p>22 always accurately reflect reporting relationships,</p>	<p style="text-align: right;">29</p> <p>1 of my review of material I do recall looking at</p> <p>2 materials related to product launches.</p> <p>3 Q. Is it fair to say that the documents you</p> <p>4 requested to look at most related to whether or</p> <p>5 not Roxane observed and adhered to corporate</p> <p>6 formalities?</p> <p>7 A. No. No.</p> <p>8 Q. What other aspects of corporate</p> <p>9 governance did the documents you asked to look at</p> <p>10 cover?</p> <p>11 A. So, I, in other words -- so I believe</p> <p>12 your question was -- the previous question you</p> <p>13 asked me was, was the focus of my document request</p> <p>14 related to materials having to do with corporate</p> <p>15 formalities and I said no because in my opinion</p> <p>16 while corporate formalities are a relevant issue</p> <p>17 with respect to issues having to do with corporate</p> <p>18 control, corporate governance, and corporate</p> <p>19 responsibility, I don't view it as the only factor</p> <p>20 that is relevant. It's simply one of -- you know,</p> <p>21 of a large number of factors. So I was certainly</p> <p>22 interested in corporate formalities but it was by</p>

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<p style="text-align: right;">30</p> <p>1 no means the only or even, you know, kind of a</p> <p>2 primary focus of my document requests or my</p> <p>3 investigation.</p> <p>4 Q. Did you ask to look at materials</p> <p>5 relating to the approval of pricings, various</p> <p>6 prices at Roxane? I can rephrase that, that's a</p> <p>7 poorly worded question.</p> <p>8 Did you ask to look at materials</p> <p>9 relating to the processes by which Roxane set</p> <p>10 prices for its products?</p> <p>11 A. Yes.</p> <p>12 Q. In forming your opinion, are there any</p> <p>13 materials that you relied on more than others that</p> <p>14 you regarded as more important than others and, if</p> <p>15 so, which?</p> <p>16 A. It's difficult to answer that because in</p> <p>17 some ways the materials are kind of interrelated</p> <p>18 in the sense that there would be a deposition of</p> <p>19 somebody and that person would make reference to</p> <p>20 documents and so it's difficult to kind of</p> <p>21 separate out the document from the discussion in</p> <p>22 the deposition that related to the document.</p>	<p style="text-align: right;">32</p> <p>1 A. I received the documents in hard copy.</p> <p>2 Q. Was it one batch?</p> <p>3 A. I think -- well, there was one sort of</p> <p>4 main batch then other things such as the Perri</p> <p>5 deposition -- right, that may have come -- there</p> <p>6 may have been other things that came separately.</p> <p>7 So I would say both. There was a batch and then</p> <p>8 there's some other separate things.</p> <p>9 Q. Did you only request documents at one</p> <p>10 time or did you request documents, look at</p> <p>11 materials and then request different kinds of</p> <p>12 documents?</p> <p>13 A. Well my -- I tried to make my first</p> <p>14 request as broad as possible since I tried to ask</p> <p>15 for -- I mean I asked for documents that were</p> <p>16 generally related. I'm trying to think if I had</p> <p>17 any -- I had the sense that I might have asked for</p> <p>18 some follow ups but sitting here right now I can't</p> <p>19 recall specifically what it was that I -- which</p> <p>20 specific things I asked for and by way of follow</p> <p>21 up, although I do have the sense that I did</p> <p>22 discuss with some attorneys additional</p>
<p style="text-align: right;">31</p> <p>1 Having said that, I can't say that there</p> <p>2 was any -- there was no document that was, you</p> <p>3 know -- that I regarded as kind of, you know,</p> <p>4 clearly dispositive that they were all, most --</p> <p>5 there were a huge number of relevant documents</p> <p>6 that I regarded as kind of useful in formulating</p> <p>7 my opinion.</p> <p>8 Q. Are there documents listed in Exhibit 3</p> <p>9 that you looked at and determined that they had no</p> <p>10 bearing on your opinion?</p> <p>11 A. I do not -- sitting here right now I</p> <p>12 can't recall thinking that any document had no</p> <p>13 bearing on my opinion, no. I don't -- I can't</p> <p>14 recall -- I wouldn't want to say categorically no,</p> <p>15 obviously some appeared to me -- maybe not</p> <p>16 obviously, but some appeared to be more relevant</p> <p>17 than others but I can't think of any that I, you</p> <p>18 know, thought were, you know, entirely -- that I</p> <p>19 could think of immediately as being entirely use -</p> <p>20 - you know, unhelpful.</p> <p>21 Q. Logistically how did you receive the</p> <p>22 documents?</p>	<p style="text-align: right;">33</p> <p>1 documentation.</p> <p>2 Q. If you could turn to page 11 of Exhibit</p> <p>3 3, some of these entries reflect deposition</p> <p>4 transcript and exhibits, do you see that?</p> <p>5 A. Yes.</p> <p>6 Q. Did you read all of these deposition or</p> <p>7 did you conduct searches in them?</p> <p>8 A. I read of these, the depositions</p> <p>9 certainly Berkle, Duy, Russillo, Sykora, Tupa</p> <p>10 Ciarelli -- yes, I read all these depositions.</p> <p>11 Paoletti, Waterer, McIntyre. Perri is somewhere</p> <p>12 else I guess.</p> <p>13 Q. Who suggested that these were the</p> <p>14 depositions you should look at?</p> <p>15 A. I believe that these depositions were --</p> <p>16 I mean I can't speak for what the people supplying</p> <p>17 me with the material thought, but I think my</p> <p>18 understanding, expectation, and belief is that</p> <p>19 these depositions were supplied to me in response</p> <p>20 to my -- the request that I described to you a</p> <p>21 moment ago for relevant information about the</p> <p>22 relationships among these companies and the</p>

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<p style="text-align: right;">34</p> <p>1 corporate governance of these businesses.</p> <p>2 Q. Did you identify people by name or was</p> <p>3 it certain categories of depositions that you</p> <p>4 requested?</p> <p>5 A. It was categories of depositions.</p> <p>6 Q. Is it your understanding that all of the</p> <p>7 documents identified in Exhibit 3 have been</p> <p>8 produced to the United States?</p> <p>9 A. I have no information or opinion about</p> <p>10 the document production to the government. I</p> <p>11 don't -- that never came up.</p> <p>12 Q. Other than deposition transcripts, can</p> <p>13 you identify any document listed in Exhibit 3 that</p> <p>14 was not originally a Roxane or Boehringer</p> <p>15 document?</p> <p>16 A. Okay. Excuse me, other than which</p> <p>17 documents?</p> <p>18 Q. Other than the deposition transcripts</p> <p>19 and exhibits?</p> <p>20 A. Oh, sorry. Okay. Well, we discussed</p> <p>21 item 505 --</p> <p>22 Q. Right.</p>	<p style="text-align: right;">36</p> <p>1 date.)</p> <p>2 Q. Does this appear to be a letter you sent</p> <p>3 to Kirkland & Ellis?</p> <p>4 A. Yes.</p> <p>5 Q. Can I direct your attention to the</p> <p>6 itemized statement of time and expenses, the</p> <p>7 second page of the letter. Does this reflect all</p> <p>8 your work in this case?</p> <p>9 A. No.</p> <p>10 Q. Does this reflect all the work in this</p> <p>11 case prior to the production of your expert</p> <p>12 report?</p> <p>13 A. I don't recall but I don't -- I notice</p> <p>14 this date, the date -- the last date -- this</p> <p>15 invoice represents my time during the month of</p> <p>16 February. I believe that my expert report was</p> <p>17 submitted in March at some point, so to the best</p> <p>18 of my recollection, there was time in March</p> <p>19 devoted to the expert report that would be</p> <p>20 reflected on a different invoice. That would be</p> <p>21 reflected on the March invoice.</p> <p>22 Q. Have you sent a March invoice to</p>
<p style="text-align: right;">35</p> <p>1 A. -- that was not a Roxane or Boehringer</p> <p>2 document. I suppose -- I mean, you know,</p> <p>3 obviously I reviewed, as I mentioned to you</p> <p>4 before, the complaint. I don't know if it's on</p> <p>5 this list but that would be another separate one.</p> <p>6 Those are the only ones I can recall at the</p> <p>7 moment.</p> <p>8 Q. So to your recollection, entry number</p> <p>9 505 is the only document you located as a result</p> <p>10 of your own research?</p> <p>11 A. I believe that's correct.</p> <p>12 Q. Did you conduct any interviews with</p> <p>13 Roxane or BIPI employees?</p> <p>14 A. No, I did not.</p> <p>15 Q. I think you can put this aside.</p> <p>16 I'm going to introduce this letter as</p> <p>17 Exhibit 4. For the record, it's a March 1st, 2009</p> <p>18 letter, appears to be from Professor Macey to</p> <p>19 Kirkland & Ellis.</p> <p>20 (Whereupon, March 1st, 2009 letter</p> <p>21 from Mr. Macey to Kirkland & Ellis, was marked as</p> <p>22 Exhibit Macey 004 for identification, as of this</p>	<p style="text-align: right;">37</p> <p>1 Kirkland & Ellis?</p> <p>2 A. Yes.</p> <p>3 MR. FAUCI: I'll just say to Maria, we</p> <p>4 haven't received that.</p> <p>5 MS. RIVERA: Okay. I will check on</p> <p>6 that, I will get you a copy. My understanding was</p> <p>7 that it had been produced, so I can get you that</p> <p>8 today.</p> <p>9 MR. FAUCI: Yes, any time before</p> <p>10 tomorrow would be great.</p> <p>11 Q. Have you submitted a -- I think I just</p> <p>12 asked if you submitted a March invoice?</p> <p>13 A. Yes.</p> <p>14 Q. Have you submitted an April invoice?</p> <p>15 A. No, not that -- I don't believe that I</p> <p>16 have. I'm pretty sure that I have not.</p> <p>17 MR. FAUCI: I'll ask Maria to produce</p> <p>18 whatever invoices you have.</p> <p>19 Q. Since the last date on this invoice is</p> <p>20 February 28th, 2009, since that date can you</p> <p>21 describe what you've done in connection with this</p> <p>22 case?</p>

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Macey, Jonathan R.

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18 (Pages 66 to 69)

<p style="text-align: right;">66</p> <p>1 Q. Are there other officers for a company 2 that you would consider top officers besides the 3 CEO?</p> <p>4 A. Well, again it depends on the business, 5 but the person in charge of the finances generally 6 would be the other kind of key person.</p> <p>7 Q. What about vice presidents in charge of 8 certain aspects of the operating business?</p> <p>9 A. From the standpoint of comparing really 10 officers with directors those people would really 11 be in a little bit of a different category.</p> <p>12 Q. They generally have more responsibility 13 for day-to-day functioning?</p> <p>14 A. Well all of the officers -- that's what 15 the officers are supposed to do. The difference 16 is not so much day-to-day versus non day-to-day, 17 rather the difference would be with respect to 18 kind of more discrete or specialized function as 19 opposed to kind of an overall responsibility for 20 the firm as a whole.</p> <p>21 Q. Is there a difference in your mind 22 between discrete and global responsibilities on</p>	<p style="text-align: right;">68</p> <p>1 with managing its operations; is that correct?</p> <p>2 A. Can you give that to me again?</p> <p>3 (Record read.)</p> <p>4 A. Yes, the day-to-day business.</p> <p>5 Q. And officers can include the president, 6 the treasurer, the CEO, the CFO, positions like 7 that are officers?</p> <p>8 A. Well with respect to your last question, 9 just in terms of the operations of the business it 10 would include -- yeah, it would include a broad 11 sort of group of people, yes. So in terms of 12 running the day-to-day business, that would 13 include a fairly broad group of people.</p> <p>14 Q. Is it your opinion that it is routine 15 for holding companies to provide certain services 16 to subsidiaries such as legal, IT, financial and 17 accounting services?</p> <p>18 A. Yes.</p> <p>19 Q. Did BIC provide such services to its 20 subsidiaries?</p> <p>21 A. My recollection here is that most of the 22 kind of shared services were provided by a</p>
<p style="text-align: right;">67</p> <p>1 one hand and strategic or high level and day-to- 2 day responsibilities on the other?</p> <p>3 MS. RIVERA: Object to form.</p> <p>4 A. I think -- if I understood your question 5 correctly, I think there are a number of 6 distinctions in that question. So, there are 7 difference between strategic decision making and 8 nonstrategic decision making. And I think there 9 are also differences between global nonstrategic 10 decision making and discrete nonglobal decision- 11 making. So you'd have two employees, like one 12 could be a CEO who's -- or a comptroller or 13 financial officer who are involved in every single 14 aspect of the firm but much of their work may not 15 be strategic. And then you could have somebody 16 with a specialized function, say, in research or 17 accounting or law or whatever, who may be -- who 18 is also a nonstrategic but is not global because 19 they're involved only in a specific aspect of a 20 company's business.</p> <p>21 Q. In general terms, as compared to a board 22 of directors, a corporation's officers are tasked</p>	<p style="text-align: right;">69</p> <p>1 separate company with respect to certain of these 2 services or with respect to others that BIPI 3 provided those services.</p> <p>4 Q. Is it normal and typical that such 5 services would be provided by one subsidiary 6 corporation to another?</p> <p>7 A. Yes, very common.</p> <p>8 Q. What is that opinion based on?</p> <p>9 A. It's based on my own experience as well 10 as research and analysis.</p> <p>11 Q. Is it typical that one subsidiary 12 corporation will emerge as the primary operating 13 company within a group of subsidiary corporations?</p> <p>14 A. I'm not quite sure I understand what you 15 mean. I will say that it is extremely common that 16 for one subsidiary among a group of subsidiaries 17 to, for lack of a better term, really to be -- I 18 don't know, kind of the alpha subsidiary, to be 19 the subsidiary that's the most profitable, that 20 gets the most attention, the most resources, its 21 businesses evolve over time, some just become more 22 important than others as a consequence of the</p>

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<p style="text-align: right;">70</p> <p>1 market really.</p> <p>2 Q. And in such a circumstance is it typical</p> <p>3 for the alpha subsidiary to participate in the</p> <p>4 management of other subsidiary corporations?</p> <p>5 A. What would be -- well, just to be very</p> <p>6 clear here, I want to make it something that I</p> <p>7 think is important to clarify is -- at the risk of</p> <p>8 stating the obvious but I think it's necessary, a</p> <p>9 corporation of course is an inanimate object, as</p> <p>10 the saying goes. It has no -- what is the term,</p> <p>11 no soul to damn, no body to kick or something like</p> <p>12 that. So corporations cannot act, period. They</p> <p>13 have to have -- there have to be individuals who</p> <p>14 in, you know, corporations to act, so it's -- so a</p> <p>15 caveat to that is, you know, it's just a matter of</p> <p>16 corporate governance it's imperative to kind of</p> <p>17 figure out some way to figure out to determine</p> <p>18 when a corporation is acting for many, many, many,</p> <p>19 many, many reasons and when, you know, individuals</p> <p>20 within the corporation are either acting on their</p> <p>21 own behalf or acting as agents for other</p> <p>22 corporations.</p>	<p style="text-align: right;">72</p> <p>1 relationship to Roxane.</p> <p>2 Q. Can you turn to paragraph 21 of your</p> <p>3 report?</p> <p>4 A. Okay.</p> <p>5 Q. I'm looking at the second sentence. You</p> <p>6 say that holding companies routinely nominate and</p> <p>7 elect boards of directors of their subsidiary</p> <p>8 companies, participate in the management of their</p> <p>9 subsidiaries, provide advice and strategy and</p> <p>10 financial support, and perform various services</p> <p>11 for their operating subsidiaries including tax</p> <p>12 reporting, legal services, accounting services and</p> <p>13 cash management services.</p> <p>14 Do you see that?</p> <p>15 A. Yes.</p> <p>16 Q. My question is, is it typical for one</p> <p>17 subsidiary corporation to do all of those things</p> <p>18 for another subsidiary corporation?</p> <p>19 A. Yes, I understood that question when you</p> <p>20 asked it before and yes.</p> <p>21 Q. And based on your review of the</p> <p>22 materials in this case, is it your opinion that</p>
<p style="text-align: right;">71</p> <p>1 So the answer to your question is</p> <p>2 complicated based on that, which is, one, it is</p> <p>3 exceedingly common for, as I mentioned earlier,</p> <p>4 for people in a sibling company or in a subsidiary</p> <p>5 company to play multiple roles, to be agents both</p> <p>6 of the company that the sort of alpha company or</p> <p>7 one company within a corporate group and other</p> <p>8 companies within the corporate group. It's also</p> <p>9 common for the subsidiary company to deal -- a</p> <p>10 subsidiary company to deal with other subsidiary</p> <p>11 companies and for those companies to have</p> <p>12 interactions and relationships.</p> <p>13 I just -- the point I want to make in</p> <p>14 brief is simply that these are two very different</p> <p>15 things. It's one thing to say a company is acting</p> <p>16 on behalf of another company, and that occurs</p> <p>17 sometimes and it also occurs sometimes that</p> <p>18 individuals within a subsidiary company are acting</p> <p>19 on behalf of that subsidiary company and they may</p> <p>20 at various times act on behalf of other subsidiary</p> <p>21 companies, so we see both going on simultaneously</p> <p>22 and I saw both going on with respect to BIPI's</p>	<p style="text-align: right;">73</p> <p>1 BIPI, in fact, performed many of the functions</p> <p>2 identified in paragraph 21?</p> <p>3 MS. RIVERA: Object to form.</p> <p>4 A. Yes. To put it as clearly as I can, as</p> <p>5 I talked a moment ago, companies evolve at</p> <p>6 different rates and in different ways and it may</p> <p>7 be that in a subsidiary's development it requires</p> <p>8 certain services, say, legal service as an</p> <p>9 internal legal function before other subsidiaries</p> <p>10 within the group. And having already established</p> <p>11 a legal function in subsidiary A, it often is</p> <p>12 efficient, and the reason the holding companies</p> <p>13 are considered to be, you know, efficient in the</p> <p>14 economies that before -- in situations where it</p> <p>15 might otherwise not be cost effective or efficient</p> <p>16 for another subsidiary to, as a free standing</p> <p>17 entity create such a function, it could be</p> <p>18 economical for it to utilize the services provided</p> <p>19 by the other subsidiary. So that's why it's</p> <p>20 extremely common for affiliate companies to</p> <p>21 perform these services. And holding companies</p> <p>22 frequently have, not always, but very frequently</p>

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19 (Pages 70 to 73)

<p style="text-align: right;">70</p> <p>1 market really.</p> <p>2 Q. And in such a circumstance is it typical</p> <p>3 for the alpha subsidiary to participate in the</p> <p>4 management of other subsidiary corporations?</p> <p>5 A. What would be -- well, just to be very</p> <p>6 clear here, I want to make it something that I</p> <p>7 think is important to clarify is -- at the risk of</p> <p>8 stating the obvious but I think it's necessary, a</p> <p>9 corporation of course is an inanimate object, as</p> <p>10 the saying goes. It has no -- what is the term,</p> <p>11 no soul to damn, no body to kick or something like</p> <p>12 that. So corporations cannot act, period. They</p> <p>13 have to have -- there have to be individuals who</p> <p>14 in, you know, corporations to act, so it's -- so a</p> <p>15 caveat to that is, you know, it's just a matter of</p> <p>16 corporate governance it's imperative to kind of</p> <p>17 figure out some way to figure out to determine</p> <p>18 when a corporation is acting for many, many, many,</p> <p>19 many, many reasons and when, you know, individuals</p> <p>20 within the corporation are either acting on their</p> <p>21 own behalf or acting as agents for other</p> <p>22 corporations.</p>	<p style="text-align: right;">72</p> <p>1 relationship to Roxane.</p> <p>2 Q. Can you turn to paragraph 21 of your</p> <p>3 report?</p> <p>4 A. Okay.</p> <p>5 Q. I'm looking at the second sentence. You</p> <p>6 say that holding companies routinely nominate and</p> <p>7 elect boards of directors of their subsidiary</p> <p>8 companies, participate in the management of their</p> <p>9 subsidiaries, provide advice and strategy and</p> <p>10 financial support, and perform various services</p> <p>11 for their operating subsidiaries including tax</p> <p>12 reporting, legal services, accounting services and</p> <p>13 cash management services.</p> <p>14 Do you see that?</p> <p>15 A. Yes.</p> <p>16 Q. My question is, is it typical for one</p> <p>17 subsidiary corporation to do all of those things</p> <p>18 for another subsidiary corporation?</p> <p>19 A. Yes, I understood that question when you</p> <p>20 asked it before and yes.</p> <p>21 Q. And based on your review of the</p> <p>22 materials in this case, is it your opinion that</p>
<p style="text-align: right;">71</p> <p>1 So the answer to your question is</p> <p>2 complicated based on that, which is, one, it is</p> <p>3 exceedingly common for, as I mentioned earlier,</p> <p>4 for people in a sibling company or in a subsidiary</p> <p>5 company to play multiple roles, to be agents both</p> <p>6 of the company that the sort of alpha company or</p> <p>7 one company within a corporate group and other</p> <p>8 companies within the corporate group. It's also</p> <p>9 common for the subsidiary company to deal -- a</p> <p>10 subsidiary company to deal with other subsidiary</p> <p>11 companies and for those companies to have</p> <p>12 interactions and relationships.</p> <p>13 I just -- the point I want to make in</p> <p>14 brief is simply that these are two very different</p> <p>15 things. It's one thing to say a company is acting</p> <p>16 on behalf of another company, and that occurs</p> <p>17 sometimes and it also occurs sometimes that</p> <p>18 individuals within a subsidiary company are acting</p> <p>19 on behalf of that subsidiary company and they may</p> <p>20 at various times act on behalf of other subsidiary</p> <p>21 companies, so we see both going on simultaneously</p> <p>22 and I saw both going on with respect to BIPI's</p>	<p style="text-align: right;">73</p> <p>1 BIPI, in fact, performed many of the functions</p> <p>2 identified in paragraph 21?</p> <p>3 MS. RIVERA: Object to form.</p> <p>4 A. Yes. To put it as clearly as I can, as</p> <p>5 I talked a moment ago, companies evolve at</p> <p>6 different rates and in different ways and it may</p> <p>7 be that in a subsidiary's development it requires</p> <p>8 certain services, say, legal service as an</p> <p>9 internal legal function before other subsidiaries</p> <p>10 within the group. And having already established</p> <p>11 a legal function in subsidiary A, it often is</p> <p>12 efficient, and the reason the holding companies</p> <p>13 are considered to be, you know, efficient in the</p> <p>14 economies that before -- in situations where it</p> <p>15 might otherwise not be cost effective or efficient</p> <p>16 for another subsidiary to, as a free standing</p> <p>17 entity create such a function, it could be</p> <p>18 economical for it to utilize the services provided</p> <p>19 by the other subsidiary. So that's why it's</p> <p>20 extremely common for affiliate companies to</p> <p>21 perform these services. And holding companies</p> <p>22 frequently have, not always, but very frequently</p>

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Macey, Jonathan R.

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<p style="text-align: right;">74</p> <p>1 have a very small number of employees. They're</p> <p>2 really set up to sort of management the investment</p> <p>3 part and not to provide operational functions.</p> <p>4 Q. Is it appropriate for one subsidiary</p> <p>5 company to participate in the management of</p> <p>6 another subsidiary company?</p> <p>7 MS. RIVERA: Object to form.</p> <p>8 MR. FAUCI: What's the objection?</p> <p>9 MS. RIVERA: What do you mean by</p> <p>10 management, it's very vague.</p> <p>11 Q. Go ahead.</p> <p>12 A. Oh, I'm sorry. As I mentioned before,</p> <p>13 it's extremely common, routine, beyond routine,</p> <p>14 normal for personnel within subsidiaries to be</p> <p>15 actively involved in the management and operations</p> <p>16 of sibling companies because, as I mentioned, it's</p> <p>17 extremely common to see people in these various</p> <p>18 corporate groups wear a multitude of hats. And</p> <p>19 it's also extremely common for companies,</p> <p>20 subsidiary companies to contract with each other</p> <p>21 and to have interactions of a variety of kinds so</p> <p>22 that the expertise of one is utilized or the</p>	<p style="text-align: right;">76</p> <p>1 already assumes part of my analysis, which is fine</p> <p>2 I just want to make it clear, and that is, you</p> <p>3 know, we have separate, identifiable entities,</p> <p>4 BIPI and Roxane, so that we can tell who's doing</p> <p>5 what for whom at all purposes. And from the</p> <p>6 standpoint of sort of my methodology and analysis</p> <p>7 that's a very important distinction among various</p> <p>8 kinds of corporate governance relationships that</p> <p>9 we observe.</p> <p>10 Q. You've opined that the corporate</p> <p>11 relationship between Roxane and BIPI was, quote,</p> <p>12 normal and typical, correct?</p> <p>13 A. Right.</p> <p>14 Q. And you've opined that the corporate</p> <p>15 relationship between Roxane and its parent, BIC,</p> <p>16 was, quote, normal and typical correct?</p> <p>17 A. Yes.</p> <p>18 Q. I understand from paragraph 21 of your</p> <p>19 report that it is routine for holding companies to</p> <p>20 provide various services for their operating</p> <p>21 subsidiaries?</p> <p>22 A. Correct.</p>
<p style="text-align: right;">75</p> <p>1 services of one are utilized for the benefit or</p> <p>2 the benefit of the other. The issue is always,</p> <p>3 from a corporate governance perspective and from a</p> <p>4 perspective of evaluating whether this is</p> <p>5 appropriate or not, is whether or not it's</p> <p>6 possible to figure out where one of these</p> <p>7 subsidiary ends and the other one begins. So just</p> <p>8 to be -- just as a very general matter, a lot of</p> <p>9 your -- a lot of your questions kind of -- this</p> <p>10 question, I should say, takes the form of is it</p> <p>11 normal for a subsidiary to provide services for</p> <p>12 another subsidiary, and I just want to make it</p> <p>13 clear, from my perspective this kind of jumps into</p> <p>14 the question kind of midway in the analysis in the</p> <p>15 sense that, generally, what one of the things I'm</p> <p>16 doing in this report and in my analysis in this</p> <p>17 case, is trying to figure out, you know, are these</p> <p>18 companies separate and distinct, do they operate</p> <p>19 as separate and distinct businesses with kind of</p> <p>20 unique integrity as discrete entities. And so</p> <p>21 when, you know, you say to me, well is BIPI</p> <p>22 providing services to Roxane let's say, that</p>	<p style="text-align: right;">77</p> <p>1 Q. Is it also routine for -- and I</p> <p>2 understand from your testimony -- correct me if</p> <p>3 I'm wrong -- that it is also your opinion that it</p> <p>4 is routine for one subsidiary to provide those to</p> <p>5 another?</p> <p>6 A. Correct.</p> <p>7 Q. Is it routine for one subsidiary to not</p> <p>8 provide such services to another?</p> <p>9 A. Well that's a difficult question. In</p> <p>10 other words, it would be very surprising to see a</p> <p>11 holding company with two subsidiaries particularly</p> <p>12 if they're in, you know, where there are economies</p> <p>13 of scale or efficiencies to see no services being</p> <p>14 performed. So if you've said, oh, here are a</p> <p>15 couple of subsidiaries and there are no</p> <p>16 relationships or interactions between the two, I'd</p> <p>17 say that is extremely rare.</p> <p>18 Q. What services did you see Roxane provide</p> <p>19 BIPI?</p> <p>20 A. My recollection is that Roxane had a</p> <p>21 couple of sales forces and that one of these sales</p> <p>22 forces would occasionally, particularly with</p>

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Macey, Jonathan R.

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<p style="text-align: right;">78</p> <p>1 respect to new product launches by BIPI products, 2 go around and kind of include the BIPI product in 3 its kind of marketing and sales or whatever. So I 4 saw that. There were some other things, too, I 5 believe, I don't know that might or might not be 6 described -- I would describe them as, you know, 7 to the extent that the services are, you know -- 8 there are services where there's kind of give and 9 take on both sides in my observations these were 10 situations in which, you know, Roxane provided a 11 service and received a benefit of some sort. And 12 BIPI may have done the same.</p> <p>13 Q. Are you aware of whether any Roxane 14 employees served in corporate officer or 15 management positions within BIPI?</p> <p>16 A. Whether any Roxane people were in 17 management positions in BIPI; I don't recall.</p> <p>18 Q. Do you recall whether any BIPI employees 19 served in management capacities in Roxane?</p> <p>20 A. There was a time when an officer at 21 BIPI, Sheldon Berkle, was involved in certain 22 oversight responsibilities involving certain</p>	<p style="text-align: right;">80</p> <p>1 dictated by fiduciary duties but rather by the 2 terms of their employment contract.</p> <p>3 Q. So if Mr. Berkle was an employee of BIPI 4 he owed certain duties to BIPI that were incident 5 to his employment, correct?</p> <p>6 A. That's correct.</p> <p>7 Q. What were the duties that he would owe 8 to Roxane if he was not an employee of Roxane?</p> <p>9 A. Well, as I mentioned before, he was an 10 agent of Roxane and as such he owed duties as an 11 agent. So in acting as an agency capacity the -- 12 somebody who was working -- it it's very common 13 for corporations to have nonemployees who are 14 agents who have the same kinds of duties that 15 officers and directors would have.</p> <p>16 Q. Is there a test to look at to determine 17 whether -- when an employee of one company 18 participates in another company and is not 19 employed by that company, is there a test to 20 determine when he is acting as an employee of 21 company A or as an agent of company B?</p> <p>22 A. Yes.</p>
<p style="text-align: right;">79</p> <p>1 Roxane products, but in those situations he really 2 wasn't doing anything by or on behalf of BIPI, I 3 would not characterize him as a BIPI agent. I 4 would say that he was wearing two hats and he was 5 operating as a Roxane person.</p> <p>6 Q. Are you aware of whether he held any 7 employment position with Roxane?</p> <p>8 A. As I said before, it's my understanding 9 -- it's my belief and opinion that Mr. Berkle 10 operated -- was acting as an agent of -- was 11 acting as an agent of Roxane, so in that sense he 12 was a Roxane agent within the commonly held 13 understanding of that term.</p> <p>14 Q. Can one -- if someone's an employee of 15 BIPI, you owe fiduciary duties to your employer, 16 correct?</p> <p>17 A. Under state law if you're a -- fiduciary 18 duties are typically limited to the very top 19 officers CEO, CFO and the directors. And that the 20 other employees have obligations of good faith and 21 fair dealing in their relationships with their 22 firm for, you know, lower level employees is not</p>	<p style="text-align: right;">81</p> <p>1 Q. What is that?</p> <p>2 A. So, the typical agency test is whether 3 the agent is -- on whose behalf the agent is 4 acting and whether the principal, which is the 5 entity on whose behalf the agent is acting, has 6 agreed to accept the services of the agent. So 7 the idea is that if you have, you know -- again, 8 extremely common for people to serve two hats, 9 that means they have dual agency relationships at 10 various levels within holding companies and their 11 subsidiaries. And so while in some situations it 12 may be -- that I've observed actually, it may be 13 difficult to tell how -- in what capacity someone 14 is operating. For a variety of reasons, peculiar 15 to this case, it's extremely easy to tell, for 16 example, when Mr. Berkle is acting for Roxane and 17 when Mr. Berkle is acting for BIPI.</p> <p>18 Q. What are those reasons?</p> <p>19 A. Well, for one thing, both -- at all 20 relevant times that I've observed in this case, 21 Roxane manufactured particular products that were 22 wholly separate and distinct from the products</p>

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<p style="text-align: right;">82</p> <p>1 that BIPI manufactured. So that fact is by no</p> <p>2 means true for every, you know, subsidiary</p> <p>3 situation. Often subsidiaries will -- separate</p> <p>4 subsidiaries will be in exactly the same line of</p> <p>5 business and manufacture the same product.</p> <p>6 So when Mr. Berkle is interacting with a</p> <p>7 Roxane product or engaged in oversight with</p> <p>8 respect to a Roxane product, it's not confusing</p> <p>9 because one can't say, oh, that's also a BIPI</p> <p>10 product so we don't really know what he's doing.</p> <p>11 It's not a situation, this is very common where</p> <p>12 somebody can say, you know, this is something that</p> <p>13 -- this is a decision made that applies to both</p> <p>14 companies. These are decisions sometimes Mr.</p> <p>15 Berkle would make decisions that related to BIPI</p> <p>16 and sometimes he would make decisions when he was</p> <p>17 working for -- was serving as an agent for Roxane.</p> <p>18 So that's one of the kind of peculiarities of kind</p> <p>19 of the fact pattern in this case that was relevant</p> <p>20 to my analysis.</p> <p>21 Q. Do you know whether Mr. Berkle was ever</p> <p>22 paid by Roxane?</p>	<p style="text-align: right;">84</p> <p>1 capacities.</p> <p>2 Q. Do you have an opinion as to whether or</p> <p>3 not Mr. Berkle was an employee of Roxane?</p> <p>4 A. Again, I would say he is an agent. I</p> <p>5 don't have an opinion about whether an</p> <p>6 employee/employer relationship existed, no.</p> <p>7 MR. FAUCI: Let's take a couple minute</p> <p>8 break.</p> <p>9 (Recess.)</p> <p>10 Q. Can I ask you to turn to paragraph 2 of</p> <p>11 your report again?</p> <p>12 A. Certainly.</p> <p>13 Q. Paragraph 2 of your report also states</p> <p>14 that you analyzed whether defendant corporations</p> <p>15 operated as separate and independent corporate</p> <p>16 entities.</p> <p>17 Do you see that?</p> <p>18 A. Yes, I do.</p> <p>19 Q. Can you describe what it means for a</p> <p>20 corporation to function as a separate and</p> <p>21 independent corporate entity?</p> <p>22 A. Yes. So, basically the test here is</p>
<p style="text-align: right;">83</p> <p>1 A. It's my understanding, and my opinion</p> <p>2 was predicated on the kind of belief and</p> <p>3 assumption that Mr. Berkle was paid by BIPI and</p> <p>4 never received -- and did not receive a Roxane</p> <p>5 paycheck.</p> <p>6 Q. Was he an employee of BIPI?</p> <p>7 A. He was an agent of --</p> <p>8 Q. I'm sorry, was he an employee of Roxane?</p> <p>9 I believe I said BIPI.</p> <p>10 A. Right. Again, he was in agency</p> <p>11 relationship with Roxane. Roxane was the</p> <p>12 principal. He was the agent. And whether he was</p> <p>13 -- how that was thought of, it might have been an</p> <p>14 employee/employment relationship, it could have</p> <p>15 been a consulting. There are many, many kind of</p> <p>16 different vague and not very useful ways of</p> <p>17 characterizing that. But to my way of thinking</p> <p>18 and my experience, the accurate way of</p> <p>19 characterizing Mr. Berkle's relationship with</p> <p>20 Roxane is that he served a dual -- in what is</p> <p>21 known as dual agency capacity. He was an agent</p> <p>22 both for Roxane and for BIPI in various</p>	<p style="text-align: right;">85</p> <p>1 whether or not sufficient distinctions among the</p> <p>2 corporations have been made such that it's</p> <p>3 possible to tell when one corporation ends and</p> <p>4 when the next corporation begins, so that there's</p> <p>5 sufficient difference in the product orientation</p> <p>6 and in the -- and that there's, you know, when</p> <p>7 we're talking about, you know, the parent and the</p> <p>8 sibling we can have some degree of certainty that</p> <p>9 if we're talking about, say for example, a</p> <p>10 particular asset, we can say well, that asset</p> <p>11 belongs to the parent or that asset belongs to the</p> <p>12 sibling and that we don't allow kind of people to</p> <p>13 make determinations at their kind of whim and</p> <p>14 caprice about, you know, who owns what and the</p> <p>15 like.</p> <p>16 Q. The test is whether or not you can tell</p> <p>17 when one corporation begins and another ends; is</p> <p>18 that correct?</p> <p>19 A. Yes.</p> <p>20 Q. And the criteria you look to include</p> <p>21 product -- different products?</p> <p>22 A. So that would be -- that would certainly</p>

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<p style="text-align: right;">90</p> <p>1 Q. What other factors, whether a company</p> <p>2 has a board of directors, whether the company has</p> <p>3 assets?</p> <p>4 A. Looking at -- one should look at the</p> <p>5 relationships between the companies, do they do</p> <p>6 business with one another, if so, how is the</p> <p>7 business conducted --</p> <p>8 Q. Can I cut you off?</p> <p>9 A. Absolutely.</p> <p>10 Q. If companies -- you look at whether</p> <p>11 companies do business with one another; is that</p> <p>12 correct?</p> <p>13 A. Yes.</p> <p>14 Q. How is that factor relevant to the</p> <p>15 determination of whether companies are independent</p> <p>16 or not?</p> <p>17 A. Well, if you look at the way the</p> <p>18 companies do business with one another and if you</p> <p>19 see over time problems with the relationship,</p> <p>20 conflicts or failure to treat another entity as a</p> <p>21 discrete entity, then that would auger against</p> <p>22 treating the companies as separate and discrete</p>	<p style="text-align: right;">92</p> <p>1 A. He provided some -- he did some things</p> <p>2 on behalf of Roxane, yes.</p> <p>3 Q. What documentation reflects that?</p> <p>4 A. Well I saw documents indicating, for</p> <p>5 example, that Mr. Berkle was a member of board of</p> <p>6 directors of Roxane. So in that capacity it would</p> <p>7 be expected that he would owe fiduciary duties to</p> <p>8 the corporate entity and would perform the normal</p> <p>9 oversight functions of a director. In addition to</p> <p>10 that, there was a period of time in which Mr.</p> <p>11 Berkle -- not for the entire period of time I</p> <p>12 examined but for some subset of the period of time</p> <p>13 that I examined, there was a guy, let's think</p> <p>14 about his name, Mr. Wojta I think was head of</p> <p>15 Roxane. At some point he left, at some point Mr.</p> <p>16 Berkle came to the kind of U.S. BIC family of</p> <p>17 companies and was given some very high level</p> <p>18 oversight responsibility for certain -- a certain</p> <p>19 kind of small subset of products in the Roxane</p> <p>20 product line. He was given some kind of, you</p> <p>21 know, oversight responsibility with respect to</p> <p>22 marketing as I recall.</p>
<p style="text-align: right;">91</p> <p>1 legal entities. So by way of specific example,</p> <p>2 you want to look at whether a company's making a</p> <p>3 relationship with another company is whether the</p> <p>4 company's making a loan to the other company, if</p> <p>5 so, is there interest being paid, or alternatively</p> <p>6 is money just being shifted around in the</p> <p>7 organizations in such a way that you can't really</p> <p>8 trace whose assets are whose in a given time and</p> <p>9 are there -- you know, are people being shuttled</p> <p>10 in such a way you don't know who is doing what for</p> <p>11 whom and that kind of thing.</p> <p>12 Q. Did you see evidence in this case that</p> <p>13 employees were being shuttled from company to</p> <p>14 company in such a way that you didn't know who was</p> <p>15 doing what for whom?</p> <p>16 A. In this case there was -- every time an</p> <p>17 employee of one company was doing something for</p> <p>18 another company there was some kind of</p> <p>19 documentation that I was able to observe, so I</p> <p>20 didn't see that kind of shuttling, no.</p> <p>21 Q. We've agree that Shelly Berkle did some</p> <p>22 work on behalf of Roxane, correct?</p>	<p style="text-align: right;">93</p> <p>1 Q. What type of documents reflected that?</p> <p>2 A. There was a -- I forget the title of</p> <p>3 this document, it was some sort of internal office</p> <p>4 communication --</p> <p>5 Q. An employee bulletin?</p> <p>6 A. -- that indicated that Mr. Berkle was</p> <p>7 assuming the responsibilities that I've described.</p> <p>8 I think it was called the employee bulletin.</p> <p>9 Q. And so if an employee bulletin said that</p> <p>10 Shelly Berkle is assuming responsibility for some</p> <p>11 portion of Roxane's business, that would be</p> <p>12 evidence of an agency relationship between Mr.</p> <p>13 Berkle and Roxane?</p> <p>14 A. That would be evidence of an agency</p> <p>15 responsibility; that is to say, this is telling</p> <p>16 the people in the organization that Mr. Berkle had</p> <p>17 agreed to accept certain responsibilities I guess</p> <p>18 in addition to his director responsibility on</p> <p>19 behalf of Roxane.</p> <p>20 Q. Do you agree that the objective of any</p> <p>21 corporation's management is to maximize</p> <p>22 shareholder wealth?</p>

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<p style="text-align: right;">94</p> <p>1 A. Generally speaking, that is the default 2 objective, not the only objective and doesn't have 3 to be the objective, but as I've written about 4 that's what I would call the default rule. 5 Q. Did you see any evidence that that was 6 anything other than the rule in the management of 7 defendant companies? 8 A. No, I did not. 9 Q. Is there a distinction between 10 maximizing shareholder wealth and maximizing 11 corporate wealth? 12 A. In theory, no. 13 Q. But in practice? 14 A. Well in practice, there may be -- no, I 15 think in practice there's no -- let me see how to 16 put this. In practice, no, there's no distinction 17 that aspirationally, I guess I would say in 18 practice. Hopefully there's no distinction. 19 Q. Who is Roxane's shareholder? 20 A. Roxane's shareholder is BIC. 21 Q. And BIPI's shareholder? 22 A. Is BIC.</p>	<p style="text-align: right;">96</p> <p>1 Q. So for Roxane over the long haul it's 2 try and sell as many drugs as profitably as it 3 could? 4 A. I think that would be a rather -- maybe 5 a somewhat, maybe slightly different way than I 6 would put it. Maybe a little more stilted in a 7 way that certainly one of the things that 8 somebody, a company involved in sales is 9 interested in is selling, is selling products, 10 but, you know, in focusing on -- you know, it's 11 very important to understand that when -- by 12 describing BIC as a shareholder of Roxane and BIC 13 as a shareholder of BIPI, that unlike other 14 claimants on the cash flows of the firm, there's 15 no maturity date to their claims. They don't get 16 paid back at a certain date and then go away. 17 These claims are perpetual in nature which makes 18 the job of Roxane and the job of BIPI very long 19 term, very long term in nature. 20 So I guess, you know, I would agree with 21 you as long as what you're talking about is 22 maximizing sales over the long term or maximizing</p>
<p style="text-align: right;">95</p> <p>1 Q. So would you agree that Roxane and 2 BIPI's management are both tasked with maximizing 3 profitability for BIC? 4 A. Maximizing shareholder value for BIC, 5 both Roxane and BIPI. 6 Q. How would Roxane go about attempting to 7 maximize profitability for its shareholder? 8 A. It would attempt to run the company as 9 efficiently as possible as a means of trying to 10 realize what I would describe as long-term 11 shareholder wealth and long-term-value. So, you 12 know, I think it involves a big picture approach 13 where you try to, you know, take a long-term 14 perspective and you try to maximize goodwill, 15 build up the reputation of the firm, have a good 16 reputation for making high quality products and 17 trying to keep costs as reasonable as possible. 18 So those are the kinds of issues that one would 19 focus on in connection with trying to maximize 20 shareholder value, obviously depending on the 21 business, customer services and other factors 22 would be relevant.</p>	<p style="text-align: right;">97</p> <p>1 profits over the long term and keeping in mind 2 that as is often I'm afraid may be ignored, that 3 focusing too much on the short term can come at 4 great cost to the long term claimant, long term 5 constituent, which in corporations of course is 6 the equity holder or the shareholder. 7 Q. In the case of a wholly-owned 8 subsidiary, can the goal of maximizing shareholder 9 wealth be different from the goal of maximizing 10 the profitability of the individual subsidiary? 11 A. All right, keep in mind -- well, so -- 12 all right, I'm really not sure I understand that 13 one. Maybe -- 14 Q. You want me to try it again? 15 A. That would be great, if you don't mind. 16 Q. So focusing on wholly-owned subs, can 17 the goal of maximizing -- let me take a step back. 18 In the case of a situation where you have a 19 holding company that owns multiple subsidiaries -- 20 A. Right. 21 Q. -- can the goal of maximizing 22 shareholder wealth for the management of one</p>

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<p style="text-align: right;">102</p> <p>1 expired at the time that Roxane launched the 2 product. 3 MR. FAUCI: Let's introduce exhibit, I 4 think this is 6. 5 (Whereupon, e-mail dated October 6 26, 1995, was marked as Exhibit Macey 006 for 7 identification, as of this date.) 8 Q. Take a moment to familiarize yourself 9 and tell me if you've seen this document before? 10 A. Okay. 11 Q. Do you see that this document refers to 12 strategies to defend against the generic erosion 13 of Atrovent from non-BI companies? 14 A. Yes. 15 MS. RIVERA: Where are you referring? 16 MR. FAUCI: I'm looking at the third 17 bullet point. 18 MS. RIVERA: Okay. 19 Q. Then could you look to the fifth 20 paragraph down, the paragraph starting with 21 "Shelly and I have talked through"? 22 A. Okay.</p>	<p style="text-align: right;">104</p> <p>1 licensing fee would be greater than the losses 2 associated with the business that's, quote, being 3 taken away, end quote. 4 Q. Do you have an opinion as to whether 5 BIPI benefited from the preemptive launch of 6 ipratropium bromide? 7 A. It is my opinion that they were likely 8 to have benefited, I haven't seen any financial 9 results but to my way of thinking it stands to 10 reason that they benefited. 11 Q. Do you know if employees at BIPI thought 12 that the decision to allow Roxane to preemptively 13 launch ipratropium bromide would be a benefit to 14 BIPI? 15 A. I don't know. 16 Q. I'm just going to read you a quick 17 snippet from Shelly Berkle's deposition taken on 18 December -- no, October 31st, 2001. 19 A. Okay. 20 Q. It's on Halloween. 21 A. Do you want me to read along with you or 22 just listen?</p>
<p style="text-align: right;">103</p> <p>1 Q. I'm looking at the sentence starting on 2 the fourth line it says, "This should be from a 3 total U.S.A. perspective, i.e., BIPI and Roxane 4 combined strategy. For example, how much 5 ipratropium UDV business can Roxane take away from 6 BIPI and how do we shut out other non-BI generics 7 as far as possible." 8 Do you see that? 9 A. I do. 10 Q. If Roxane and BIPI were not affiliated 11 sister corporations would you expect them to adopt 12 such a strategy? 13 A. I could easily see the adoption of such 14 a strategy for non-affiliate companies, yes. 15 Q. Why would two independent, non- 16 affiliated companies adopt a strategy whereby one 17 company is supposed to quote/unquote take away 18 business from the other? 19 A. Because one company is receiving a 20 licensing fee from the other company, so the 21 theory would be that for the company whose 22 business is being taken away, the gains in the</p>	<p style="text-align: right;">105</p> <p>1 Q. I'll just read to you, I'm not going to 2 introduce it, if you need to see it to make it 3 clear, let me know. 4 A. Okay. 5 Q. I don't think it's that long. 6 MS. RIVERA: And I would just object for 7 not providing him an actual copy of the whole 8 deposition. 9 MR. FAUCI: What's the basis of the 10 objection? 11 MS. RIVERA: That you're not providing 12 him a copy of what you're going to read to him and 13 providing it in the context of the whole 14 deposition. 15 MR. FAUCI: Okay. 16 Q. You've read Mr. Berkle's 10/31/2008 17 deposition, correct? 18 A. Yes. 19 Q. The question is: 20 "Question: Would there be any long-term 21 strategic benefits to BIPI of relinquishing 22 today's profit dollars?"</p>

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<p style="text-align: right;">122</p> <p>1 reviously sworn, resumed and testified further as</p> <p>2 follows:</p> <p>3</p> <p>4 EXAMINATION (Continued)</p> <p>5 BY MR. FAUCI:</p> <p>6 Q. Professor Macey, I'm going to go back to</p> <p>7 paragraph 2 of your report.</p> <p>8 A. Okay.</p> <p>9 Q. It says you evaluated whether Roxane</p> <p>10 maintained operational control over its business,</p> <p>11 including operational control over the pricing and</p> <p>12 marketing of its products.</p> <p>13 Do you see that?</p> <p>14 A. Yes, I do.</p> <p>15 Q. Did you form an opinion about this?</p> <p>16 A. Yes.</p> <p>17 Q. What is it?</p> <p>18 A. That Roxane did, as this phrase says,</p> <p>19 operate as a separate and distinct corporate</p> <p>20 entity, maintain that Roxane did maintain</p> <p>21 operational control over its business, and that</p> <p>22 that operational control included operational</p>	<p style="text-align: right;">124</p> <p>1 products?</p> <p>2 A. Again, since Roxane, in my opinion,</p> <p>3 exerted and maintained operational control over</p> <p>4 the pricing and marketing of its products, then</p> <p>5 this would exclude the notion that BIC was</p> <p>6 exerting operational control simultaneously.</p> <p>7 Q. I'm sorry, my question is: Are you</p> <p>8 offering an opinion as to whether or not BIC</p> <p>9 knowingly participated in the decision to set</p> <p>10 inflated AWP's for Roxane's products?</p> <p>11 MS. RIVERA: Object to form.</p> <p>12 A. I guess I'm struggling a little bit</p> <p>13 because I did reach an opinion about whether BIC</p> <p>14 knowingly participated or contributed in any</p> <p>15 pricing of any kind, so to that extent I did reach</p> <p>16 -- I didn't draw any conclusions with respect to</p> <p>17 whether prices were inflated or not. I simply</p> <p>18 reached conclusions with respect to the corporate</p> <p>19 governance including who set prices.</p> <p>20 Q. Is it your opinion that BIC played no</p> <p>21 involvement whatsoever in setting -- in the</p> <p>22 decisions to set AWP's for Roxane's products?</p>
<p style="text-align: right;">123</p> <p>1 control over the pricing and marketing of its</p> <p>2 products.</p> <p>3 Q. Does your opinion encompass all of</p> <p>4 Roxane's products or just the products identified</p> <p>5 in the United States' complaint?</p> <p>6 A. My analysis included all Roxane's</p> <p>7 general way of doing business, which would include</p> <p>8 all of Roxane's products not just the ones</p> <p>9 identified in the complaint.</p> <p>10 Q. Are you offering any opinion as to the</p> <p>11 extent or nature of BIC's involvement in the</p> <p>12 pricing and marketing of Roxane's products?</p> <p>13 A. Yes, to the extent that I reached</p> <p>14 conclusions in the course of my analysis about</p> <p>15 Roxane's operational control over its business,</p> <p>16 and Roxane's marketing and pricing of its product,</p> <p>17 I regard this operational control to be an</p> <p>18 exclusive concept such that it would exclude other</p> <p>19 entities including BIC.</p> <p>20 Q. Are you offering an opinion as to</p> <p>21 whether or not BIC knowingly participated in</p> <p>22 decisions to set inflated AWP's for Roxane's</p>	<p style="text-align: right;">125</p> <p>1 A. I don't recall seeing any evidence that</p> <p>2 BIC was participating in setting prices or</p> <p>3 marketing products that this was -- these</p> <p>4 functions resided within Roxane.</p> <p>5 Q. Do you have an opinion as to whether BIC</p> <p>6 or BIPI's conduct, to the extent it exists,</p> <p>7 subjects them to liability under the False Claims</p> <p>8 Act?</p> <p>9 A. Do I have a personal opinion? I'm</p> <p>10 sorry.</p> <p>11 Q. Are you offering an opinion as to</p> <p>12 whether or not BIC and/or BIPI are liable under</p> <p>13 the False Claims Act?</p> <p>14 A. Oh, I'm not -- I don't consider myself</p> <p>15 an expert in the False Claims Act so I have not</p> <p>16 analyzed -- I'm not offering any opinion with</p> <p>17 respect to sort of ultimate liability or other --</p> <p>18 my opinion is restricted to the issues I described</p> <p>19 in my report, the corporate governance, corporate</p> <p>20 control issues.</p> <p>21 Q. Have you analyzed what is the standard</p> <p>22 for liability under the False Claims Act?</p>

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<p style="text-align: right;">126</p> <p>1 A. Again, as I said at the very beginning 2 of the deposition when you asked me, I articulated 3 then my understanding about the False Claims Act. 4 I didn't -- I mean again -- and I don't consider 5 myself an expert, I just have a general 6 understanding what the statute says. 7 Q. So you're not putting forth -- you're 8 not proffering an expert opinion on standards for 9 liability under the False Claims Act? 10 A. My opinions relate to the corporate 11 governance and control. I'm not reaching any 12 ultimate decisions or conclusions about liability 13 or the meaning of the False Claims Act. 14 Q. How did you evaluate whether or not 15 Roxane maintained operational control over the 16 pricing of its products? 17 A. I looked at information about the way 18 that Roxane did business on a day-to-day basis, 19 how the company was organized, at what sort of 20 levels within the organizations decisions were 21 made, what the sort of type and nature of these 22 decisions were, what the company said it was</p>	<p style="text-align: right;">128</p> <p>1 Q. Is it different than the concept of 2 control expressed in a statute like CERCLA? 3 A. I mean in theory one could write a 4 statute and define the terms however one wanted. 5 As it happens operational control in -- the route 6 that the U.S. Supreme Court chose to take in U.S. 7 against Best Foods adopts this sort of ordinary 8 business term of operational control, so within 9 the context of your particular question it happens 10 to be the same thing. Obviously, Congress is not 11 bound by the definition that I have or that may 12 exist in common industry custom. 13 Q. What are the criteria you look to in 14 evaluating whether a company maintains operational 15 control over its business? 16 A. Again, I look at basically how the 17 company functions. So I looked at was there a 18 separate company in fact, meaning did this company 19 have assets, did it have employees, did it have 20 enough employees that looking at what they did, 21 these employees could -- would -- you know, might 22 logically be expected to actually run the</p>
<p style="text-align: right;">127</p> <p>1 doing, both contemporaneously and in the 2 deposition testimonies of the various people. So 3 that I just basically looked at the way the 4 business operated. 5 Q. Is operational control a term of art? 6 A. Yes. 7 Q. What does it mean? 8 A. It means -- operational control in the 9 context of corporate governance means controlling 10 day-to-day operations. It means controlling 11 decisions on an ongoing basis, it means the 12 management on a day-to-day basis. It means, in 13 other words, things related to daily operations as 14 opposed to sort of one-off decisions and/or -- so 15 usual as opposed to unusual kinds of decisions and 16 issues. 17 Q. What is the source of that definition? 18 A. Just generally speaking, people who 19 write and teach about business distinguish 20 operational control from other kinds of control. 21 So it's just -- it's in the lexicon of the 22 business community.</p>	<p style="text-align: right;">129</p> <p>1 business. I look at in particular in 2 parent/subsidiary and in affiliate relationships 3 parent/affiliate relationships it's important to 4 look at the various kinds of contracts that often 5 exist between companies to see how control is 6 obligated both by consent as well as by practice. 7 Q. What factors might cause you to conclude 8 that a company did not maintain operational 9 control of its business? 10 A. So a classic case of a situation which a 11 company does not maintain operational control over 12 its business would be something like the 13 following: One, if there was an outsourcing of 14 day-to-day management. So I have observed 15 several, many, I guess, situations in which a 16 parent company or an affiliate company has 17 actually signed a contract in which the parent or 18 the affiliate is given contractual and is paid for 19 managing the day-to-day business of a company. So 20 that would be, you know, that would be an example. 21 Similarly, where if some or all of the 22 employees -- if the parent were a single affiliate</p>

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<p style="text-align: right;">130</p> <p>1 of a subsidiary, has a training operation and says</p> <p>2 this is the way we train people and we expect</p> <p>3 everyone to operate according to this sort of</p> <p>4 template, that is a situation I've observed where,</p> <p>5 in my view, there would be a -- one could see</p> <p>6 operational control particularly where there's</p> <p>7 ongoing training and a continued effort to make</p> <p>8 sure that sort of business policies and practices</p> <p>9 are carried out in an ongoing way. If there's a -</p> <p>10 - you know, if the operations of the subsidiary</p> <p>11 are carried out according to some formula or</p> <p>12 algorithm that has been -- you know, that is</p> <p>13 proprietary with the parent, I've observed</p> <p>14 situations like that which would -- you know, all</p> <p>15 of which would give me the indication that, you</p> <p>16 know, the company was not independent, it did not</p> <p>17 maintain its own operational control. Where you</p> <p>18 have instead of a holding company parent, you have</p> <p>19 an operational parent and it's actually operating</p> <p>20 the various subsidiaries, I've seen that on -- as</p> <p>21 well. So those are the kinds of situations where</p> <p>22 that I've observed and which facts would lead me</p>	<p style="text-align: right;">132</p> <p>1 Q. What about approval, is approving a</p> <p>2 decision on a price offered by a Roxane employee,</p> <p>3 is that a high level decision or is that an</p> <p>4 operational decision?</p> <p>5 A. That would -- it would depend on what</p> <p>6 you're -- what specifically you meant.</p> <p>7 Q. Well, approving the launch plan and</p> <p>8 average wholesale price for one of Roxane's</p> <p>9 products, is that an operational decision or a</p> <p>10 high level strategic decision?</p> <p>11 A. That would depend in large part on how</p> <p>12 many such factors -- I don't know whether you're</p> <p>13 talking about generally or specifically, but</p> <p>14 generally -- I think you're talking generally so</p> <p>15 I'll answer it, generally it depends on how many</p> <p>16 products the subsidiary has and a variety of other</p> <p>17 contextual features. So if you said -- your</p> <p>18 question was, what if the parent approved one of</p> <p>19 the subsidiary's marketing and pricing or product</p> <p>20 launch decisions, I think that was some reasonable</p> <p>21 facsimile of your question, and there it depends</p> <p>22 on, you know, is this one decision out of two, or</p>
<p style="text-align: right;">131</p> <p>1 to the conclusion that a company did not maintain</p> <p>2 operational control.</p> <p>3 Q. Paragraph 78 of your report, you write,</p> <p>4 that it is standard practice for a parent</p> <p>5 corporation to monitor and oversee its</p> <p>6 subsidiaries' operations.</p> <p>7 Do you see that?</p> <p>8 A. Yes.</p> <p>9 Q. It also states it is standard practice</p> <p>10 for a parent corporation to set high level policy</p> <p>11 and strategy at a subsidiary?</p> <p>12 A. Yes.</p> <p>13 Q. Do you see that?</p> <p>14 A. Yes, I do.</p> <p>15 Q. How is such monitoring by a parent</p> <p>16 corporation different than assuming operational</p> <p>17 control?</p> <p>18 A. Well the short answer is that monitoring</p> <p>19 involves -- I'm trying to think of a synonym for</p> <p>20 monitoring. Monitoring involves the process of</p> <p>21 observing and evaluating as opposed to the process</p> <p>22 of implementing or administrating.</p>	<p style="text-align: right;">133</p> <p>1 one decision out of 47.</p> <p>2 Q. Do you know how many products Roxane had</p> <p>3 at any given time?</p> <p>4 A. I, only in general terms, I don't know</p> <p>5 exactly.</p> <p>6 Q. Do you know enough to hazard a guess or</p> <p>7 no?</p> <p>8 A. I know that it was many but I don't know</p> <p>9 enough to hazard a precise numerical guess.</p> <p>10 Q. More than 50?</p> <p>11 A. I don't know if it was more than 50, but</p> <p>12 it was in the -- it was a significant number of</p> <p>13 products.</p> <p>14 Q. And are you aware there were various</p> <p>15 prices set for each of Roxane's products?</p> <p>16 A. Just to be clear, you mean am I aware</p> <p>17 that there were -- yeah, well, I'm sorry in some</p> <p>18 way I'm aware of that, yes.</p> <p>19 Q. That there's contract prices, wholesale</p> <p>20 acquisition costs, average wholesale prices, are</p> <p>21 those terms all familiar to you?</p> <p>22 A. Yes.</p>

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<p style="text-align: right;">154</p> <p>1 possible despite whatever cooperative activities</p> <p>2 they engage in that people on the outside of the</p> <p>3 businesses can still make a determination about</p> <p>4 what the proper contours, whether -- what the</p> <p>5 assets are of a corporation, where one company</p> <p>6 begins and another company ends. Of course, it</p> <p>7 would be important to the extent you have a</p> <p>8 business unit that envelopes business</p> <p>9 organizations or corporations you'd want the</p> <p>10 corporations to maintain their, you know, filings</p> <p>11 with the secretary of state, to make whatever</p> <p>12 corporate tax payments, to keep a board of</p> <p>13 directors, maintain corporate formalities, but</p> <p>14 again those are part of the picture. To my way of</p> <p>15 thinking the critical issue is that it be possible</p> <p>16 for an objective observer to delineate the actual</p> <p>17 contours of the companies and say, this is what</p> <p>18 this company is, there are its assets, here's its</p> <p>19 corporate campus, here are its employees, this is</p> <p>20 its board of directors. And here is another</p> <p>21 company and there may be people who wear two hats</p> <p>22 in both of these organizations. There may be</p>	<p style="text-align: right;">156</p> <p>1 described, initially included both Roxane and</p> <p>2 BIPI.</p> <p>3 Q. Do you have an opinion as to whether the</p> <p>4 Ethical Pharmaceuticals Business Unit, as it came</p> <p>5 into being, included both BIPI and Roxane?</p> <p>6 A. In certain respects it did, yes.</p> <p>7 Q. What certain respects?</p> <p>8 A. Well, so, there was an effort made to</p> <p>9 seek these kind of synergies or efficiencies and</p> <p>10 Roxane was included in the sense that they were</p> <p>11 included in the effort, but it is my understanding</p> <p>12 that this initiative did not sort of result in --</p> <p>13 you know, it was an unsuccessful attempt to</p> <p>14 integrate the various aspects of these companies</p> <p>15 even in a limited way.</p> <p>16 Q. What is that opinion based on?</p> <p>17 A. It's based on deposition testimony, Mr.</p> <p>18 Berkle and others.</p> <p>19 Q. Do you know how long the Ethical</p> <p>20 Pharmaceutical Business Unit existed?</p> <p>21 A. Not precisely but I know it existed for</p> <p>22 several years.</p>
<p style="text-align: right;">155</p> <p>1 people who -- you know, there may be coordinated</p> <p>2 activities and there will be lots of interactions,</p> <p>3 but, you know, we still -- we're still not in a</p> <p>4 situation where one is unable to tell where one</p> <p>5 company ends and the other begins.</p> <p>6 Q. Are you familiar with the Ethical</p> <p>7 Pharmaceuticals Business Unit?</p> <p>8 A. Yes.</p> <p>9 Q. What is it?</p> <p>10 A. Just in broad terms, the Ethical</p> <p>11 Pharmaceuticals Business Unit was -- is the term</p> <p>12 for an initiative that was started and in which</p> <p>13 Sheldon Berkle was put in charge with the idea of</p> <p>14 trying to find some sort of common approaches and</p> <p>15 methodology to business issues as between Roxane</p> <p>16 and BIPI.</p> <p>17 Q. Do you have an opinion as to whether or</p> <p>18 not the Ethical Pharmaceuticals Business Unit</p> <p>19 included BIPI's business?</p> <p>20 A. I believe that's what I just said.</p> <p>21 Q. And so the answer is yes?</p> <p>22 A. I believe that the concept, as it was</p>	<p style="text-align: right;">157</p> <p>1 Q. And for all -- do you have any reason to</p> <p>2 doubt that for the years that it existed it</p> <p>3 included both Roxane and BIPI?</p> <p>4 A. I recall seeing documents that</p> <p>5 specifically -- looking at documents that</p> <p>6 suggested that while the Ethical Pharmaceuticals</p> <p>7 Business Unit kind of made an effort to include</p> <p>8 Roxane it actually ultimately, particularly with</p> <p>9 respect to multisource products did not follow</p> <p>10 through, did not actually do it.</p> <p>11 Q. What do you mean it did not follow</p> <p>12 through?</p> <p>13 A. In other words, whatever efforts that</p> <p>14 were being made to coordinate and/or the</p> <p>15 activities of Roxane and BIPI did not actually</p> <p>16 result in the coordination of those efforts and</p> <p>17 that those synergies weren't realized and those</p> <p>18 efficiencies weren't achieved and those efforts</p> <p>19 were not coordinated.</p> <p>20 Q. Isn't it a different question whether</p> <p>21 the benefits that were hoped for by the creation</p> <p>22 of the Ethical Pharmaceutical Business Unit</p>

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<p style="text-align: right;">158</p> <p>1 materialized, isn't that a different question than 2 whether or not Roxane and BIPI were part of the 3 part of the Ethical Pharmaceuticals Business Unit? 4 A. Well, no. Or to put it differently, I'm 5 regarding -- if you look at the history of this 6 Ethical Pharmaceuticals Business Unit it was 7 basically an effort to achieve certain goals, that 8 the idea was we're going to work to achieve 9 certain goals, so I'd regard that as sort of the 10 idea. And so to the extent that this -- that 11 there was an idea or a goal associated with this, 12 I think that one can make an assessment about 13 whether or not that goal was reached or achieved. 14 Q. Starting with 1994, who was in charge of 15 the business unit? 16 A. My recollection -- I can't recall 17 whether Mr. Berkle came in to the business unit in 18 '94 or '96, it's my recollection that he was in 19 charge from the beginning, although I may be 20 mistaken about that. 21 Q. I direct your attention to paragraph 86 22 of your report. You're talking about an October </p>	<p style="text-align: right;">160</p> <p>1 King, I'm not quite certain of all four of their 2 names. But the basic idea is that they were 3 people at BIPI with expertise in one kind of 4 subsegment of the Roxane constellation of 5 products, if you will, that is branded generics 6 and branded drugs and those people were brought 7 in, as I say, not to, you know -- and, literally, 8 as we see I think in this organizational chart, 9 kind of layered into the Roxane organization. 10 They retained their roles at BIPI but they also 11 took over some responsibilities at, you know -- I 12 wouldn't say take over some responsibilities but 13 they were involved, as I think Mr. Berkle 14 testified, in with high level supervisory roles 15 over the sales and marketing of Roxane's branded 16 and branded generic products. 17 Q. So we've identified Mr. Leonetti, Mr. 18 Fulton, Mr. Ciarelli and maybe Mr. King? 19 A. I think that's right. 20 Q. Are these -- these people were BIPI 21 employees, correct? 22 A. It's my opinion and belief that prior to </p>
<p style="text-align: right;">159</p> <p>1 1998 reorganization. I'm going to quote midway 2 through the paragraph but feel free to read the 3 whole paragraph. You write: "To further these 4 goals, certain BIPI employees were given high 5 level supervisory roles over the sales and 6 marketing of Roxane's brand and branded generic 7 products." 8 Who are you referring to? 9 A. I think this is actually very poorly 10 worded. Here what I'm referring to is that for a 11 brief period of time with respect to certain of 12 Roxane's drugs, like Mr. Russillo who is placed in 13 as an agent with dual responsibilities, there were 14 some other people who were also, if you will, 15 seconded, given additional responsibilities beyond 16 their responsibilities to BIPI were also given 17 responsibilities at Roxane. 18 Q. Who were they? 19 A. So these people, my recollection is, 20 there was Leonetti, there were three -- I think 21 four of these people, I don't recall, Fulton and 22 Leonetti are two of them. Ciarelli, I think maybe </p>	<p style="text-align: right;">161</p> <p>1 this 1998 corporate reorganization, these people 2 were exclusively BIPI employees but at some point 3 they moved over to -- they took on kind of a 4 second hat, they took on a second job just in the 5 way that Mr. Berkle did who had responsibilities 6 both in Roxane and in BIPI. These people were 7 given responsibilities in Roxane -- in Roxane and 8 in BIPI as well. 9 Q. Did they become Roxane employees? 10 A. Again, they became agents of Roxane. I 11 have no opinion about, you know, whether they 12 became employees, but they were acting as agents 13 of Roxane, to the extent they were involved in the 14 high level supervision of these subset products 15 for this 1998, late 1998 period of time. 16 Q. Is there a test for determining when 17 someone becomes an agent of a company? 18 A. Yes. 19 Q. What is that? 20 A. Okay. So the test hasn't -- well, so 21 the test is whether or not someone is offered and 22 is willing to serve an organization, whether that </p>

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<p style="text-align: right;">162</p> <p>1 organization or principal, as the agent's</p> <p>2 principals, as the term is used, to act by and on</p> <p>3 behalf of the principal. So the basic test for an</p> <p>4 agent is kind of an offer and acceptance of</p> <p>5 performing the role of an agent. And there is</p> <p>6 absolutely no requirement in agency principals</p> <p>7 that the agent be compensated by the principal in</p> <p>8 the form of being an employee or kind of direct</p> <p>9 cash, but the agency is, you know, is an extremely</p> <p>10 well recognized concept in business organizations.</p> <p>11 Q. You're aware that Werner Gerstenberg,</p> <p>12 for instance, served as an employee of both Roxane</p> <p>13 and BIC, correct?</p> <p>14 A. Again, as I mentioned with respect to</p> <p>15 these other people, my determination in terms of</p> <p>16 corporate organization relate to fiduciary</p> <p>17 relationships, agency relationships,</p> <p>18 responsibilities of reporting. I have made no</p> <p>19 determination about people's employment</p> <p>20 relationships, although I will say that, generally</p> <p>21 speaking, somebody who has a title of president</p> <p>22 and COO is, generally speaking, is considered to</p>	<p style="text-align: right;">164</p> <p>1 as BIPI employees if it's your testimony that they</p> <p>2 are really also Roxane agents?</p> <p>3 A. Right. Well two things -- and again the</p> <p>4 first is that, as I mentioned earlier, I don't</p> <p>5 think this is the most artfully worded paragraph</p> <p>6 I've ever written, and second that it's my</p> <p>7 recollection -- it was my belief at the time I</p> <p>8 wrote this and still my belief that at the time</p> <p>9 these people were sort of given their second hat,</p> <p>10 they were, in fact, BIPI employees. That's what</p> <p>11 they were exclusively BIPI -- you know, that they</p> <p>12 didn't have an agency relationship prior to this.</p> <p>13 Q. Prior to 1998?</p> <p>14 A. Right. Prior to these October 1998</p> <p>15 organizational changes.</p> <p>16 Q. So it's your belief, as you sit here</p> <p>17 today, that Mike Leonetti, Jim King, Gregg</p> <p>18 Ciarelli, Greg Fulton's agency relationship</p> <p>19 started with Roxane in 1998?</p> <p>20 A. Sitting here right now, that's my</p> <p>21 recollection.</p> <p>22 Q. Are there circumstances when -- taking a</p>
<p style="text-align: right;">163</p> <p>1 be an employee of the company for which they are a</p> <p>2 president or COO.</p> <p>3 Q. Are you aware of formal documents, board</p> <p>4 minutes or otherwise, that designated either Mike</p> <p>5 Leonetti, Greg Fulton, Jim King, Gregg Ciarelli to</p> <p>6 be agents of Roxane?</p> <p>7 A. The 1998 reorganization which gave these</p> <p>8 people certain high level oversight</p> <p>9 responsibilities would have satisfied the</p> <p>10 requirements for the creation of an agency</p> <p>11 relationship.</p> <p>12 Q. Are there -- what are the requirements</p> <p>13 for the creation of an agency relationship?</p> <p>14 A. So the agent has to be willing to act on</p> <p>15 the principal's behalf, in this case the agents</p> <p>16 are the people who at BIPI who are being asked to</p> <p>17 put on a second Roxane hat. And the principal has</p> <p>18 to accept that the agent is going to be acting by</p> <p>19 and on behalf of it, the principal.</p> <p>20 Q. In that paragraph 86 of your report you</p> <p>21 write that certain BIPI employees were given high</p> <p>22 level supervisory roles, why did you refer to them</p>	<p style="text-align: right;">165</p> <p>1 step back from there, the Roxane situation.</p> <p>2 A. Okay.</p> <p>3 Q. Are there circumstances when an employee</p> <p>4 of one subsidiary works on behalf of another</p> <p>5 subsidiary and does not thereby become an employee</p> <p>6 -- an agent of the second subsidiary? I can give</p> <p>7 that another shot if you want.</p> <p>8 A. No, no, no. Well I just want to focus</p> <p>9 on the term, you used the word on behalf of, so</p> <p>10 the essence of an agency relationship is that as</p> <p>11 an agent I'm working on behalf of the principal.</p> <p>12 So I could -- so my answer to the question is, if</p> <p>13 the person who's performing this capacity is doing</p> <p>14 so knowingly and volitionally, and if the</p> <p>15 principal has acquiesced or accepted the</p> <p>16 relationship, then it's axiomatic that it's an</p> <p>17 agency relationship because that's what an agency</p> <p>18 relationship.</p> <p>19 Q. Just to be clear, if we have a situation</p> <p>20 with multiple corporations within a single</p> <p>21 corporate family, when an employee of subsidiary A</p> <p>22 accepts and does work on behalf of subsidiary B,</p>

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<p style="text-align: right;">194</p> <p>1 here, does that suggest an agency relationship is 2 created between Mike Leonetti and Roxane? 3 A. It doesn't -- in this paragraph the 4 expression -- I'm not sure I'm exactly where you 5 are, but correct me if I'm mistaken, if you're 6 saying does the sentence, I've asked Mike Leonetti 7 to lead the business unit's managed care and trade 8 relations organization reporting directly to me, 9 that doesn't convey really enough information for 10 me to make a judgment as to whether an -- by 11 itself as to whether an agency relationship was 12 created. 13 Q. Do you see that Rich Feldman was in 14 charge of the RLI trade relations according to 15 this document? 16 A. Yes, I do. 17 Q. Do you see that Rich is reporting to 18 Mike Leonetti according to this document? 19 A. Yes, I don't see it but that's my 20 recollection. I'm sure I could find it. Yes, I 21 do see it now, thank you. Yeah. 22 Q. If Mr. Feldman is reporting to Mr.</p>	<p style="text-align: right;">196</p> <p>1 become a Roxane agent, what factors do they look 2 at? 3 A. You'd look at the two factors I pointed 4 to earlier, which are is the person acting, does 5 the person, you know, volunteer or acquiesce in 6 acting on behalf of the principal and is the 7 principal accepted that designation and derived a 8 benefit from it such that the agent can be held 9 responsible for acting and accountable for acting 10 in the principal's behalf. 11 Q. Can you describe the pricing approval 12 process at Roxane? 13 We can move those documents for the time 14 being. 15 MS. RIVERA: Object to form. 16 Q. Rephrase then. Can you describe the 17 process by which AWP's were implemented for 18 Roxane's products? 19 A. Generally speaking, yes, or that is to 20 say, as we've been talking about for the last few 21 hours, Roxane had a lot of products over a long 22 period of time and that were dealt with in</p>
<p style="text-align: right;">195</p> <p>1 Leonetti, how do you evaluate whether Mr. Leonetti 2 is acting as a BIPI employee or whether he's 3 turned in to a Roxane agent? 4 A. Well there the -- this is, you know, 5 part of some sort of set of information that I 6 would take into account in making that analysis. 7 Other things that I would look at would be 8 precisely what it was that Mr. Leonetti did, what 9 actions. So my point is that the terminology, and 10 again this is generally speaking, my impression of 11 Mr. Berkle's writing but, if you look at the 12 sentence says, I have asked Mr. Berkle to lead the 13 business units managed care and trade relations 14 organizations reporting directly to me -- 15 Q. Do you mean -- 16 A. -- it doesn't necessarily create an 17 agency relationship unless we understand, you 18 know, did Mike Leonetti -- what exactly Mike 19 Leonetti did pursuant to that request. 20 Q. If a court is looking to evaluate 21 whether a BIPI employee who performs -- who 22 promotes some product on Roxane's behalf has</p>	<p style="text-align: right;">197</p> <p>1 discrete and individual ways, some generalizations 2 are possible though. As I point out in my report, 3 generally speaking, there were with respect to 4 what average wholesale prices, AWP's, it is my 5 understanding that personnel within the Roxane 6 organization had day-to-day line responsibility 7 consistent with the deposition testimony of Mr. 8 Russillo and Mr. Berkle for establishing prices 9 and that in terms of the ordinary day-to-day 10 operations of Roxane that people at the level of 11 Judy Waterer and Linda -- I'm trying to remember 12 her last name -- Paoletti. 13 Q. Lesli Paoletti. 14 A. I'm sorry, did I say Linda, Lesli 15 Paoletti, were making those decisions with respect 16 to pricing. 17 Q. Did the process differ for Roxane's 18 branded generic products as opposed to what it 19 regarded as its pure multisource products? 20 A. The pricing process? 21 Q. The process by which average wholesale 22 prices were set and approved?</p>

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<p style="text-align: right;">230</p> <p>1 Gerstenberg's capacity as president of BIC. I</p> <p>2 don't remember focusing on what or seeing very</p> <p>3 much in the record that I can recall right now</p> <p>4 about what Mr. Russillo thought in that way, but</p> <p>5 in my experience in corporations people who are</p> <p>6 nonlawyers typically don't really think in those</p> <p>7 terms. They just think generally about reporting.</p> <p>8 So I'm not sure what Mr. -- what was going on in</p> <p>9 Mr. Russillo's mind.</p> <p>10 Q. Let's go back to paragraph 2 of your</p> <p>11 report. I'm at subpart A, the second sentence you</p> <p>12 write: "I also examined the theory and public</p> <p>13 policy considerations that drive the circumstances</p> <p>14 under which the corporate form should be</p> <p>15 disregarded and explained why the corporate form</p> <p>16 generally should be respected such that piercing</p> <p>17 the corporate veil should only be done in rare and</p> <p>18 unusual circumstances that are not present in this</p> <p>19 case."</p> <p>20 Do you see that?</p> <p>21 A. Yes, I do.</p> <p>22 Q. Are you offering an opinion that</p>	<p style="text-align: right;">232</p> <p>1 based on my own experience that both positively</p> <p>2 and normatively piercing the corporate veil should</p> <p>3 only be done in rare and unusual circumstances</p> <p>4 that are not present in this case. It would be --</p> <p>5 it's not really up to me, it would be up to a</p> <p>6 judge or a jury I would think to reach the</p> <p>7 determination of whether this one of those cases</p> <p>8 or not. So I'm not offering -- I don't see this</p> <p>9 as my offering a legal opinion with respect to,</p> <p>10 you know, the issue of whether the corporate veil</p> <p>11 should be pierced with respect to Roxane. I don't</p> <p>12 think I mention Roxane in this paragraph,</p> <p>13 subparagraph A of paragraph 2.</p> <p>14 Q. Well you specify that the corporate veil</p> <p>15 should only be pierced in certain rare and unusual</p> <p>16 circumstances, correct?</p> <p>17 A. Yes. I do.</p> <p>18 Q. Are you offering an opinion that those</p> <p>19 rare and unusual circumstances are not present in</p> <p>20 this case?</p> <p>21 A. Again, with respect to the ultimate</p> <p>22 conclusions in this case I might have formed a</p>
<p style="text-align: right;">231</p> <p>1 Roxane's corporate veil should not be pierced in</p> <p>2 this case?</p> <p>3 A. Well in this paragraph I'm not, in this</p> <p>4 paragraph I'm simply saying that I've examined</p> <p>5 these theories and I believe that as somebody who</p> <p>6 does teaching and research in this area I</p> <p>7 understand these policy considerations.</p> <p>8 Q. I'm just focusing on, I guess, the</p> <p>9 second clause where you say that you explain why</p> <p>10 the corporate form generally should be respected</p> <p>11 such that piercing the corporate veil should be</p> <p>12 only done in rare and unusual circumstances that</p> <p>13 are not present in this case. Maybe I'm just</p> <p>14 trying to understand that sentence.</p> <p>15 A. Okay.</p> <p>16 Q. Are you offering an opinion that</p> <p>17 Roxane's corporate veil should not be pierced?</p> <p>18 A. No. What I'm doing in this sentence --</p> <p>19 maybe it's not clear, but what I'm doing in this</p> <p>20 sentence is offering an explanation for why the</p> <p>21 corporate form, generally, should be respected and</p> <p>22 making the observation as an empirical matter</p>	<p style="text-align: right;">233</p> <p>1 personal opinion but I'm not offering an expert</p> <p>2 opinion with respect to whether those</p> <p>3 circumstances are present in this case. I think</p> <p>4 it would be up to the trier, somebody applying the</p> <p>5 law in this case to make a determination about</p> <p>6 whether or not -- you know, whether or not the</p> <p>7 legal tests met.</p> <p>8 Q. You're not offering an opinion as to</p> <p>9 whether or not the criteria and factors necessary</p> <p>10 to pierce the corporate veil have been satisfied</p> <p>11 or haven't been satisfied in this case?</p> <p>12 A. Correct. I'm offering analysis of the</p> <p>13 corporate governance relationships and also</p> <p>14 analysis of the policies both in favor of and</p> <p>15 against disregarding the corporate form or in</p> <p>16 favor of and against respecting the corporate</p> <p>17 form.</p> <p>18 Q. What are the rare and unusual</p> <p>19 circumstances when the corporate veil should be</p> <p>20 pierced?</p> <p>21 A. So the classic situation in which the</p> <p>22 corporate veil should be pierced is a situation in</p>

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Macey, Jonathan R.

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<p style="text-align: right;">234</p> <p>1 which you have an inability on the part of the 2 plaintiff, whether it's a contract creditor or a 3 tort creditor, to distinguish or make any judgment 4 about who the defendant is whether the from -- 5 this is known as the alter ego theory. Where the 6 contours of the corporation A and corporation B, 7 whether it's an affiliate or a parent begin and 8 end. Also it is the case that there are, as many 9 people have observed including myself, a 10 significant difference in the kind of -- in 11 analytical properties of a disregarding the 12 corporate form situation that involves a tort and 13 one that involves a fraud, a contractual fraud; 14 that is to say, contract cases and tort cases, I 15 mean to say not fraud in tort cases, excuse me. 16 So the idea is in the contract cases the 17 issue is, in addition to the first issue of can we 18 tell where the corporation begins and ends, the 19 other issue is with respect to contract cases is, 20 was there any deception such that the counterparty 21 in the contractual relationship thought that it 22 was dealing with a parent, thought it was dealing</p>	<p style="text-align: right;">236</p> <p>1 A. Yes. 2 Q. And is it fair to say in the situation 3 of a tort plaintiff, the issue of capitalization 4 is comparatively more important? 5 A. In the contracts cases assuming equal 6 bargaining power, no fraud in a contracts case, 7 then capitalization should be irrelevant because 8 in a situation of equal contracting power, to the 9 extent that an entity is undercapitalized, unlike 10 the tort context, the price in the contract or the 11 interest rate charged for the loan or the other 12 contractual terms can compensate for the 13 additional risk associated in the contract setting 14 with doing business with an undercapitalized firm. 15 Whereas in the tort context, obviously -- I'm 16 sorry in the tort context because of the 17 involuntary nature of the relationship between the 18 plaintiff and the defendant, by definition, no 19 plaintiff can deal -- can take into account the 20 capitalization issue, so the capitalization issue 21 is relevant. 22 So I just make that clarification</p>
<p style="text-align: right;">235</p> <p>1 with the affiliate. And in that case it's -- that 2 is frequently cited in economics discussions as a 3 reason why the corporate veil should be 4 disregarded. 5 In a torts case the issue is the where - 6 - because in torts cases there isn't by definition 7 any reliance, the question is again always that 8 first question that I've mentioned, can you -- is 9 it possible to discern the contours of the 10 corporation where it begins, does it have any 11 assets, what are those assets and then in the tort 12 case would also look, which the contract case 13 shouldn't do, add capitalization issues from a 14 policy point, were appropriate legal rules 15 followed with respect to licensing, insurance, 16 dividend policy and that sort of thing in the tort 17 context. 18 Q. I'm going to try and make sure I 19 understand all that. In the contract -- is it 20 fair to say that in the contract situation the 21 issue of deception is comparatively more important 22 than it is in the tort situation?</p>	<p style="text-align: right;">237</p> <p>1 because it's not that capitalization is very often 2 dispositive in any of these situations, but that 3 it's really irrelevant in the contract setting but 4 it is relevant in the torts context. 5 Q. Is that because the contract plaintiff 6 has chosen to enter into a contract with the 7 defendant and presumably had access to make a 8 decision about how capitalized they were or 9 weren't assuming there is no fraud? 10 A. Yes, exactly. And as one veers away 11 from those assumptions, those fairly rigid, 12 stylized assumptions then one would bear away from 13 the strict sort of completely ignoring 14 capitalization. 15 Q. Do you have an opinion as to whether 16 this case is more akin to a torts plaintiff or a 17 contracts plaintiff? 18 A. Well in this case there was, if I'm 19 understanding the facts correctly, there's no -- I 20 guess it depends really how one looks at the case, 21 but the idea is I've seen no facts that suggest 22 reliance on any -- that there was sort of this</p>

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Macey, Jonathan R.

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<p style="text-align: right;">250</p> <p>1 were transferred?</p> <p>2 A. Not offhand, no.</p> <p>3 (Whereupon, Document entitled,</p> <p>4 "Trade Relations Structure", was marked as Exhibit</p> <p>5 Macey 013 for identification, as of this date.)</p> <p>6 Q. Exhibit 13 is a document entitled,</p> <p>7 "Trade Relations Structure" and it lists the eight</p> <p>8 national account managers and there are two</p> <p>9 supervisors, do you see that?</p> <p>10 A. Yes.</p> <p>11 MS. RIVERA: Can I just put an</p> <p>12 objection, my recollection is this is part of a</p> <p>13 bigger document --</p> <p>14 MR. FAUCI: It is.</p> <p>15 MS. RIVERA: -- so to the extent it is</p> <p>16 part of a larger document, I just object that the</p> <p>17 witness has not been provided with the entire</p> <p>18 document.</p> <p>19 Q. I guess I'll say this, the only question</p> <p>20 I have about this document is just to identify</p> <p>21 that these people were, in fact, Roxane's and --</p> <p>22 the eight national account managers with their two</p>	<p style="text-align: right;">252</p> <p>1 multisource or the brand generic products, were</p> <p>2 transferred over to BIPI. And that if it may be</p> <p>3 that these salespeople were -- I can't recall</p> <p>4 specifically these names, but my recollection more</p> <p>5 generally is that I analyzed the fact that some</p> <p>6 employees did go over to BIPI, some Roxane</p> <p>7 employees did go over to BIPI in connection with</p> <p>8 that. But I regard that as a fairly major</p> <p>9 reorganization of the companies by the holding</p> <p>10 company that wouldn't involve a sort of hour to</p> <p>11 hour or day-to-day you're working for this</p> <p>12 company, you're working for that company tomorrow</p> <p>13 and the next day you're working for a third</p> <p>14 company and you're still sitting at the same desk,</p> <p>15 which has been a serious concern, I'm aware, when</p> <p>16 people go about thinking about how to organize</p> <p>17 parent, subsidiaries and affiliates.</p> <p>18 Q. Do you know whether Judy Waterer ever</p> <p>19 transferred companies?</p> <p>20 A. I don't recall that she did, no.</p> <p>21 Q. Lesli Paoletti?</p> <p>22 A. I don't recall.</p>
<p style="text-align: right;">251</p> <p>1 supervisors.</p> <p>2 Do you know if Richard Feldman ever</p> <p>3 switched from one company to another?</p> <p>4 A. I believe that he did, yes. I believe</p> <p>5 he did. I'm not -- yes, that's my recollection.</p> <p>6 Q. What about Bob Sykora?</p> <p>7 A. I don't recall about Mr. Sykora.</p> <p>8 Q. Mike Doan?</p> <p>9 A. I don't recall.</p> <p>10 Q. Do you recall any of the other people,</p> <p>11 Anthony Tavalaro, Don Gordon, Colin Carr-Hall, Tom</p> <p>12 Via, do you recall whether any of those people</p> <p>13 switched companies?</p> <p>14 A. Can you give me a time frame?</p> <p>15 Q. I'm in the 2000, 2001 time frame?</p> <p>16 A. There was a time when Roxane got out of</p> <p>17 the branded and multisource business and my</p> <p>18 recollection is that -- when that decision was</p> <p>19 made, my recollection is, the multisource products</p> <p>20 were -- sorry, the branded generic products were</p> <p>21 sold to -- by Roxane to a company called Elan and</p> <p>22 that the branded products as distinct from the</p>	<p style="text-align: right;">253</p> <p>1 Q. This will be our last document today.</p> <p>2 (Whereupon, E-mail and attachment,</p> <p>3 was marked as Exhibit Macey 014 for</p> <p>4 identification, as of this date.)</p> <p>5 Q. Handing you what the court reporter has</p> <p>6 marked as Exhibit 14.</p> <p>7 MR. FAUCI: I'll represent for Maria's</p> <p>8 benefit that this is not -- this is a collection</p> <p>9 of some documents.</p> <p>10 MS. RIVERA: Collection of individual</p> <p>11 documents?</p> <p>12 MR. FAUCI: I'm not sure whether each</p> <p>13 page is an individual document but my only</p> <p>14 representation is that this Exhibit 14 is not one</p> <p>15 contiguous document.</p> <p>16 Q. I'm really just going to ask you to</p> <p>17 focus on the first page of this, though. Does</p> <p>18 this refresh your recollection as to whether Judy</p> <p>19 Waterer, Lesli Paoletti, Steve Snyder and Deb</p> <p>20 Kutner were transferred to Ben Venue effective</p> <p>21 January 1st, 2002?</p> <p>22 A. No.</p>

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<p style="text-align: right;">254</p> <p>1 Q. Do you have any reason to doubt Judy and 2 Lesli were transferred from Roxane to Ben Venue 3 January 1, 2002?</p> <p>4 A. Yes. My recollection is that with 5 respect to these employees who were involved in 6 the multisource aspect of Roxane's business, that 7 at one point they were transferred from the -- 8 physically transferred, is my recollection, from 9 the corporate campus, if you will, of Roxane to 10 the Ben Venue corporate campus, which was also 11 located in the state of Ohio but I think in a 12 different city. I think Roxane was Columbus and 13 Ben Venue was in Cleveland. And my understanding 14 is that and recollection of the record, this 15 document to the contrary notwithstanding, is that 16 they, while their paychecks said Ben Venue on 17 them, it is my recollection that they -- that the 18 salary that they were paid was reimbursed to Ben 19 Venue by Roxane via intercompany transfer, and 20 also it's my recollection that consistent with 21 that, these people continued to work exclusively 22 on Roxane products. So I believe that -- so I did</p>	<p style="text-align: right;">256</p> <p>1 Roxane. I haven't reached -- I refer to them 2 colloquially as employees of Roxane but I didn't 3 reach any conclusions on the precise, how I would 4 characterize the nature of their employment 5 relationship other than, again I regard them as 6 agents of Roxane regardless of what employment law 7 would say.</p> <p>8 Q. This will be my last question for today, 9 can you identify what evidence you are referring 10 to when you state that Judy and Lesli's salaries 11 were reimbursed by Roxane to Ben Venue following 12 the January 1st, 2002 time frame?</p> <p>13 A. That's my recollection. I believe this 14 was in a deposition testimony.</p> <p>15 Q. Do you have any -- as you sit here today 16 can you identify which testimony?</p> <p>17 A. No.</p> <p>18 Q. Fair enough.</p> <p>19 MS. RIVERA: Okay. Should we go off the 20 record for our discussion of timing?</p> <p>21 MR. FAUCI: Sure.</p> <p>22 (Time noted: 5:00 p.m.)</p>
<p style="text-align: right;">255</p> <p>1 take this entire -- you know, I looked carefully 2 at this entire sequence of events and I think that 3 basically the corporate practice in this firm, as 4 I think I mentioned in my report, was people 5 received a single paycheck and they typically 6 received that from the place where they were 7 tended to be physically located and -- but that 8 these people ultimately were remained dealing with 9 Roxane issues even after this date, I think that's 10 my recollection.</p> <p>11 Q. Is it your testimony that Judy Waterer 12 and Lesli Paoletti remained Roxane employees after 13 January 1st, 2002?</p> <p>14 A. Well to be clear, I may have said that 15 and that's the way I think of it, again I don't 16 regard myself as an expert on the employment 17 relationship. It's my recollection that, again, 18 they were doing work on Roxane products and that 19 they received a paycheck that said Ben Venue, but 20 that Ben Venue reimbursed -- I'm sorry, Ben Venue 21 was reimbursed by Roxane. So I would regard them 22 doing work, to use your term again, on behalf of</p>	<p style="text-align: right;">257</p> <p>1 SIGNATURE OF THE WITNESS</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8 JONATHAN R. MACEY</p> <p>9</p> <p>10 Subscribed and sworn to before me</p> <p>11 this ____ day of _____, 2009.</p> <p>12</p> <p>13</p> <p>14 NOTARY PUBLIC</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>

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